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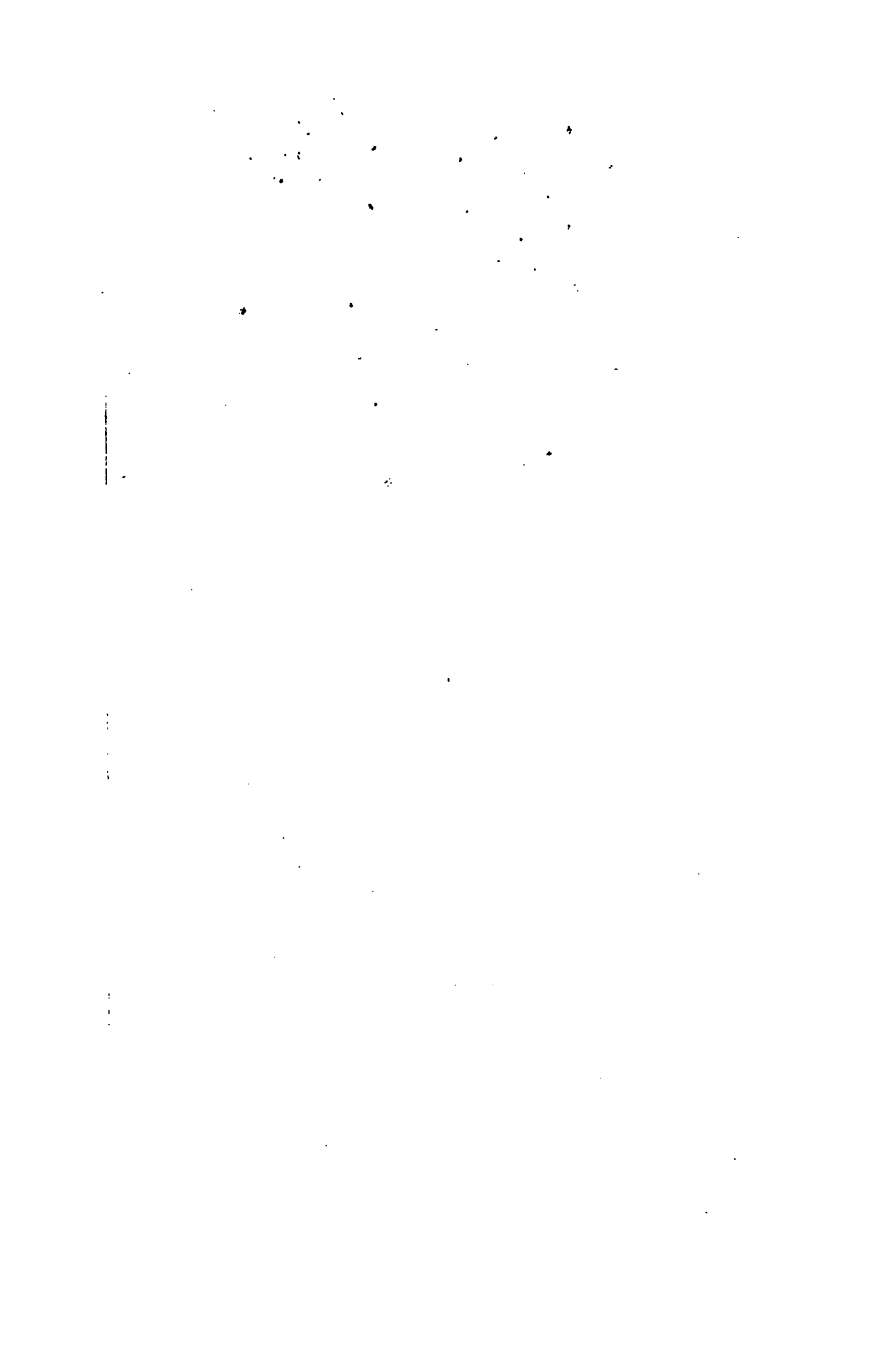
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Part I.

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REPORTS OF CASES

UNDER THE

BANKRUPTCY ACT, 1883,

DECIDED IN THE

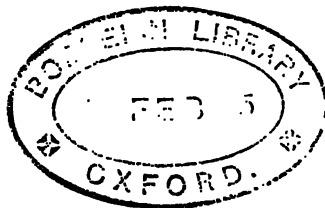
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High Court of Justice & The Court of Appeal.

REPORTED BY

CHARLES FRANCIS MORRELL,

Of the Middle Temple, Barrister-at-Law.



LONDON:

HENRY SWEET, 3, CHANCERY LANE,
Law Publisher.

1884

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PREFACE.

IN the face of the important alterations in the Law of Bankruptcy which have been brought about by the Bankruptcy Act, 1883, it has been suggested that a series of Reports of Cases decided under the New Act may be of some service to the profession.

With this view the present series of Reports has been undertaken.

It is proposed to include all Cases of importance under the New Bankruptcy Act which may be decided in the High Court of Justice or the Court of Appeal, and by this means it is hoped that in due course a complete Treatise, showing the working of the New Bankruptcy Law, may be provided.

It is felt that the value of the present Reports will be much increased if they are placed in the hands of the profession as soon as possible after the Cases noted have been decided; and an earnest endeavour will be made to ensure this being done. The effort thus to prevent any delay will, it is trusted, satisfactorily account for the size of the various parts being somewhat smaller than those of other well-known Reports, and may necessitate the issue being more frequent.

Lastly, the Editor is not unconscious of the vast importance of the task imposed upon him, in carrying out which he appeals to the friendly judgment of those in whose interests the work has been undertaken.

4, ESSEX COURT,
TRIPLE, E.C.

March 3rd, 1884.

REPORTS OF CASES
UNDER THE
BANKRUPTCY ACT, 1883,

DECIDED IN THE
High Court of Justice & The Court of Appeal.

REPORTED BY
CHARLES FRANCIS MORRELL,
Of the Middle Temple, Barrister-at-Law.

VOL. I.
COMPRISING CASES DECIDED DURING THE YEAR 1884,
TOGETHER WITH
A Complete Digest and Index.

LONDON:
HENRY SWEET, 3, CHANCERY LANE,
Law Publisher.

1885

LONDON

PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE—E.C.

TO
THE HONOURABLE
SIR LEWIS WILLIAM CAVE,

ONE OF THE JUDGES OF THE

Queen's Bench Division of the High Court of Justice,

AND

THE FIRST JUDGE

TO WHOM

BANKRUPTCY BUSINESS WAS ASSIGNED, IN ACCORDANCE WITH THE
PROVISIONS OF THE BANKRUPTCY ACT, 1883,

These Reports
OF THE FIRST CASES DECIDED UNDER THAT ACT

ARE

BY PERMISSION

Respectfully Inscribed.

ORIGINAL PREFACE TO PART I.

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4, ESSEX COURT, TEMPLE, E.C.
March 3rd, 1884.

On the completion of this the First Volume, the Reporter cannot resist adding to the above "Original Preface" one word of grateful thanks for the kind manner in which the Work has been received, and for the valuable and willing assistance which has at all times been afforded him, as well by the Officials connected with the Courts as by the members of the Profession engaged in the various Cases reported.

4, ESSEX COURT, TEMPLE, E.C.
December 18th, 1884.

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REPORTS OF CASES
DECIDED UNDER THE
BANKRUPTCY ACT, 1883.

HOUGH *v.* WINDAS AND ANOTHER.

COURT OF
APPEAL.

Bankruptcy Act, 1883, Sections 146 and 169.

1884.

Jan. 18 & 30.

Question. Whether, in a case where possession of the goods of a debtor had been taken by the sheriff under a writ of *elegit* on December 22nd, 1883, but no delivery had been made to the judgment creditor prior to January 1st, 1884, when the Bankruptcy Act 1883, came into operation (by which statute it is provided that writs of *elegit* shall no longer extend to goods), the judgment creditor was still entitled to delivery of the goods previously seized.

Held, that the judgment creditor was still entitled to delivery of the goods.

ON May 31st, 1883, the plaintiff, *E. J. Hough*, obtained a judgment against *Windas* for 2,300*l.*

On December 20th, 1883, a writ of *elegit* was issued, and possession of the debtor's goods was taken by the sheriff on December 22nd.

On January 1st, 1884, when the Bankruptcy Act, 1883, came into operation, no inquisition had been held, and the goods seized had not been delivered to the creditor.

Section 146 of the Bankruptcy Act, 1883, provides that "the sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods."

Section 169 of the Bankruptcy Act, 1883, provides that the enactments described in the 5th schedule shall be repealed, and, amongst these, the Statute 13 Edw. I. c. 18 (the Statutes of Westminster the Second. Execution either by levying of the lands and goods, or by delivery of goods and half the land, at the choice of the creditor), *in part*, namely, the words "all the

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chattels of the debtor, saving only his oxen and beasts of the plough," is included.

But by sub-section 2 (b) of the same section (169), such repeal shall not affect "any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed."

The question was raised whether the sheriff was entitled to deliver the goods to the creditor after January 1st, 1884, of which he had obtained possession before that date. In other words, whether section 146 of the Bankruptcy Act, 1883, applied to a writ which was actually in operation when the Act came into force.

On January 11th, 1884, a Divisional Court, consisting of *Manisty, J., Lopes, J., and Watkin Williams, J.*, made an order directing the sheriff to withdraw.

From this order the creditor appealed, and, after being argued before *Brett, M. R., and Bowen, L. J.*, the case was considered to be of such importance that it was directed to be re-argued before a full Court.

Douglas Walker, for the judgment creditor.

There is no bankruptcy in this case, and consequently no rights have to be considered, except those of the judgment creditor and those of the debtor. The goods are bound from the issue of the writ.

[BRETT, M. R. : How do you mean bound?]

The debtor could not part with them. The effect of the writ was to give the creditor the right to the goods. The goods cannot be disposed of by the debtor, and they cannot be taken by any other person. In *Payne v. Drewe* (4 East, 523) Lord *Ellenborough* said: "The sense in which, and extent to which, goods are in either case said to be *bound* is, that it binds the property as against the party himself, and all claiming by assignment from or representation through or under him; but it does not vest the property in the goods absolutely, as to defeat the effect of a sale thereof made by the sheriff under an execution." By the Statute of Frauds it was provided that a writ of execution should bind the property of the

goods from the time of its delivery to the sheriff. The position of the debtor is this. A debtor, as soon as seizure is made, is discharged from all further execution. (Bacon's Abridgment, 397.) This is so, even if the sheriff does not deliver the goods, or satisfy the judgment creditor.

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[THE LORD CHANCELLOR : Do you say that this would be so in case of any *vis major* ? That would hardly be the case surely if the sheriff were prevented by any compulsion of law. The reason that the debtor is discharged is because the creditor has got his goods, or at any rate has the power of having them.]

The reason given is that the debtor cannot avoid the execution. The remedy of the creditor is against the sheriff.

[BRETT, M.R. : Only if failure of execution is caused by negligence.]

I suppose the debtor is discharged because the sheriff is liable. From *Clerk v. Withers* (6 Mod. Rep. 293, 299, 300) it appears that "the sheriff after seizure is bound to the value of the goods. When he seizes the goods the defendant is actually discharged, for the plaintiff must depend upon his execution and rely upon that, and he has no further remedy against the defendant, but altogether against the sheriff." But it is necessary to show what was the position of a judgment creditor who had seized under an *elegit* before the new Act. *In *Ex parte Abbott, In re Gourlay* (L. R., 15 Ch. Div. 447), it was held that a judgment creditor who has seized under an *elegit* is a secured creditor. He was a secured creditor even in the event of bankruptcy. That was his position at the time when the Bankruptcy Act 1883, came into force. Turning to the Bankruptcy Act 1883, my contention is that it has solely a future effect to writs issued after the Act came into operation. Section 146 enacts that "the sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods." It has solely a future effect.

[BRETT, M.R. : In that view the two parts of the section are mere tautology.]

The two parts are the same, and as the second part is future so must the first part be. If this is not so, what is the position of the

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sheriff. The seizure is lawful and complete before the Act. Is he to withdraw? The Act does not direct him to withdraw.

The section, I submit, only applies to writs under which the sheriff was not in possession or to writs issued after the Act. If the section is inverted its object may be better understood. Suppose the section had been, "no writ of *elegit* shall extend to goods, and under a writ of *elegit* a sheriff shall not deliver the goods of a debtor," it would clearly have been future in its application, and it is submitted that the meaning of both parts of the section is the same. In addition to this, section 169 of the Act especially reserves rights already acquired. The creditor was in the position of a "secured creditor." (*Ex parte Abbott, In re Gourlay*, L. R., 15 Ch. Div. 447.) The words of section 169 are, that "the repeal effected by this Act shall not affect" (b) "any right or privilege acquired." The creditor had already acquired a right.

Wilkinson for the sheriff.

I appear for the sheriff. I do not propose to take any part in the argument. I have merely to submit to the order of the Court. It is usual for the sheriff to take that position.

Herbert Reed, for the debtor, in support of the order made by the Divisional Court that the sheriff should withdraw.

An Act of Parliament must be construed according to its ordinary meaning, and so as to give effect to all the words of the Act. Mere general words do not control particular words. Any section of an Act must be construed plainly, and must not be inverted. The provisions of the Bankruptcy Act, 1883, in respect of writs of *elegit*, are directed against an evil, the effects of which have long been felt. Under a writ of *elegit*, all the goods of a debtor might be delivered to a particular creditor to the prejudice of others, and it was to put an end to this evil that the provisions were inserted. Section 146 provides that the sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods. The section, I submit, clearly applies to writs already issued. It does not provide that the sheriff shall not seize the goods, as it doubtless would have done had the intention been that it should only apply to future writs. The section says "deliver,"

and the word "deliver" must be taken in its ordinary meaning. It clearly applies to writs already issued, and under which the sheriff was in possession. It is impossible that the sheriff can deliver goods under a writ issued after the Act, for it is expressly provided that no writ of *elegit* shall extend to goods; and by section 169, writs of *elegit*, so far as they affect the goods of a debtor, are abolished. In any other view, the direction that the sheriff shall not deliver is mere surplusage.

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[BRETT, M. R. : You make the whole of the principal enactment retrospective, though its words are future.]

I submit that, in applying the enactment to the future operation and effect of writs already issued, I do not make it retrospective. Sections 146 and 169 must be read so as to give effect to both. By section 169 there is an express repeal of that part of the Statute of Westminster which refers to goods. The effect of section 169, taken alone, being of itself to prevent goods and chattels being taken in execution under any writ of *elegit* issued after January 1st, 1884, it follows that the enactment contained in section 146 would have nothing at all on which to operate unless it was intended expressly to apply to cases where execution has begun, but has not been perfected, by delivery before that date. The meaning, I submit, is that after the commencement of the Act the sheriff shall not deliver goods which but for section 146 he might have delivered. He shall not deliver under a writ issued before January 1st. The writ is gone after that date, and it would be impossible for him therefore to deliver.

[BRETT, M. R. : What would be the position of the sheriff ?]

He is protected by section 169.

[The LORD CHANCELLOR : If the legislature had meant that the sheriff shall not deliver under a writ of *elegit* issued before the Act, would it not have said so ?]

I submit that that is the plain meaning of the section. Unless it is so construed, the words of the first part of the section are mere surplusage, and although direct and positive in its terms, it is altogether of no effect. And further, if section 146 refers to writs

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issued before the Act, the mere general words of section 169, sub-section 2 (b) have no effect to override the special words of section 146. There can be no hardship, for the Act passed in August and did not come into operation until the 1st of January. The whole object of the Act is to secure the goods for the general body of the creditors, and it ought to be construed so as to give effect to this purpose.

Douglas Walker in reply.

The question to be considered is solely between the judgment creditor and the debtor. There is no bankruptcy. The second part of section 146 is clearly future, and so must the first part be.

[BRETT, M. R.: If that be so, the same thing has been said three times over—twice in section 146, and then in the saving clause.]

Judgment reserved.

Jan. 30.
 Judgment.

LORD CHIEF JUSTICE COLERIDGE:

I am about to deliver an opinion written by the Lord Chancellor, in which any individual suggestions of my own are embodied. In this case a writ of *elegit* was issued at the suit of the appellant, a judgment creditor for 2,300*l.*, against goods of the respondent, under the Statute of Westminster (13 Edw. I. c. 18), on December 20th, 1883. The sheriff took possession on December 22nd, 1883. The effect of this proceeding, as the law stood at that time, was to entitle the creditor to delivery of the goods seized, to an amount (to be ascertained by appraisement) sufficient to satisfy his debt. In *Ex parte Abbott* (L. R., 15 Ch. Div. 447) it was determined by the Court of Appeal that, under similar circumstances, the creditor acquired a specific interest before appraisement in the goods seized, which a bankruptcy then intervening did not defeat.

There is in this case no bankruptcy; but it is contended, and it has been decided by the Court below, that the effect of the present Bankruptcy Act (passed August 25th, 1883), which came into

operation on January 1st, 1884, is to deprive the judgment creditor of the right to delivery of the goods given to him by the Statute of Westminster.

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In *Ex parte Abbott* (L. R., 15 Ch. Div. 447) Lord Justice James said that this kind of proceeding against goods and chattels by way of elegit "was an absurd anachronism," which he hoped to see soon abolished by the legislature. This has been done, so far, at all events, as relates to any writ of elegit issued after December 31st, 1883. But the question is whether the effect of the statute has also been to intercept from a judgment creditor the fruits of such a writ, previously issued, under which the sheriff was on that day lawfully in possession. The legislature might, if it thought fit, have put an end to that form of process against goods and chattels immediately on the passing of the Bankruptcy Act, and before the time appointed for the commencement of its general operation. But this was not done. It is beyond controversy that a writ of elegit might at any time between August 25th, 1883, and January 1st, 1884, have been issued against goods and chattels and duly executed by delivery, and that the title of the creditor to goods so delivered would have been unaffected by the Act.

The enactment which is supposed to have had the effect of wholly nullifying the right which the creditor had in this case acquired before the new law came into operation is contained in the latter (the 146th) of two sections (under the heading "Executions"), both independent of bankruptcy. The 146th section is thus expressed—" (1) The sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods : (2) No writ of *levari facias* shall hereafter be issued in any civil proceeding." Unless there be anything else in the Act to require a different construction, or some demonstrable repugnancy or inconsistency, I should myself have thought the rule "*Omnis nova constitutio futuris formam imponere debet et non præteritis*" applicable to an enactment so expressed—applicable, that is, with reference to the day appointed for the Act to "commence" and "come into operation," though later than that on which it received the Royal Assent. The word "hereafter" in the second sub-section means after the commencement of the Act, which speaks generally from the time of its commencement. If the legislature had meant to take away rights

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previously acquired, such an intention (being opposed to the spirit and principle of the presumption expressed in the maxim to which I have referred, and recognized by Sir Edward Coke and other great authorities) might have been expected to be made unequivocally clear, which, to my mind at least, it certainly is not. According to the ordinary presumption the words "a writ of elegit" as here used would mean a writ first issued, or, at all events, first made effective, after (and not before) the commencement of the Act.

The latter part of the sub-section "nor shall a writ of elegit extend to goods" cannot, in my opinion, without much violence to the natural meaning of the words, receive any other construction. The writ which was issued in the present case, in the usual and prescribed form, under and according to the provisions of the Statute of Westminster (then still unrepealed and unaltered), beyond all question did extend to goods in fact and in law. If the legislature had intended, as from December 31st, 1883, to alter the construction as well as to intercept the further execution of such a writ already issued and then in the sheriff's hands, it would surely have found a more appropriate way of expressing that intention than by saying "a writ of elegit shall not extend to goods." It has been suggested that these words not only may include, but mean solely and exclusively, "a writ of elegit issued before the commencement of the Act." Such a construction, as it seems to me, would interpolate a limitation which, if meant, might very easily have been expressed. I cannot myself doubt that these words do refer to writs of elegit to be afterwards issued; and if so, I think it is a strong reason for construing the same words "a writ of elegit," where they first occur in the immediate context of the same sentence, as having the same meaning.

Before I notice the argument mainly relied upon in support of the contrary view, I must advert to one founded upon the 2nd sub-section—"No writ of levam facias shall hereafter be issued in any civil proceeding." It was inferred from this that the legislature, when it used the different language of the first sub-section, had not in view writs to be "hereafter issued." To this argument it is in my judgment a sufficient answer, that by the 2nd sub-section it was meant to prohibit altogether the issue, after the

commencement of the Act, in any civil proceedings, of any writ of *levari facias*. By the 1st sub-section, it was not contemplated or intended that writs of *elegit* should cease to be issued, but only that their form and effect should be altered. The difference in the language of the two sub-sections (assuming both of them to leave untouched the operation of writs actually issued and effective before the commencement of the Act) is merely such as this difference required, or at least made natural and appropriate.

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The main argument was, that any other construction than that adopted by the Court below would make either the former or latter part of the 1st sub-section inofficious and superfluous, and would be the contrary to the rule that effect must be given to all the words.

After full consideration of this argument, I am unable to agree with it. I see no difficulty here in giving effect to all the words consistently with the appellant's construction, or on placing upon each branch of the sub-section a distinct sense, and although it may be true that what is said, either in the first or in the second branch, might have been inferred (in point of law) from what is said in the other, I cannot admit that there is any such presumption against fulness or even superfluity of expression in statutes and other written instruments as to amount to a rule of interpretation controlling what might otherwise be their proper construction. No doubt, when the words admit of it, that interpretation which makes them more officious with respect to the clear and ascertained policy of the statute or purpose of the instrument is (in general) to be preferred to that which makes them less so. But for the reasons which I have already given (and others which I shall hereafter add) I find nothing here from which I can infer that it was the policy of this enactment to destroy and nullify rights acquired and already in process of realisation before its commencement. And I adhere to an opinion expressed by myself in the House of Lords more than ten years ago in *Giles v. Melsom* (L. R., 6 H. L. Cas. 24), which, unless I am much deceived, I have also heard in substance expressed by great masters of the law, that nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning only because they are superfluous.

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According to my view of the proper and legal meaning of clause 146 of the Bankruptcy Act of 1883, the first part of the sentence, "The sheriff shall not under a writ of elegit deliver the goods of a debtor," takes away for the future the remedy against goods by way of elegit given to judgment creditors by the Statute of Westminster; and the subsequent words constituting the second part of the sentence require the form of the writ to be altered for the future in accordance with that change in the law. I cannot accede to the view that, because express words so dealing with the form of the writ may have been inserted *ex abundanti cautela*, and may really not have been necessary, the construction which either those or the preceding words would have received, if they had stood alone, ought to be altered.

It is important to bear in mind that delivery by the sheriff is the whole and sole right given to the elegit creditor by the Statute of Westminster, all other things which the sheriff has to do under the writ commanding him to make such delivery (entry, seizure and appraisement) being merely preliminary acts not expressed in the statute or in the writ, but implied from the nature of the duty to be performed. The words of the statute (to which the 146th section of the new Bankruptcy Act plainly refers) are, "When debt is recovered or knowledged in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and the one-half of his land, until the debt be levied, according to a reasonable price or extent." The Bankruptcy Act, by the words "the sheriff shall not under a writ of elegit deliver the goods of a debtor," takes away as to the goods this whole remedy, and a construction depriving a creditor of his title to delivery, in a case in which the goods were in the hands of the sheriff under an elegit duly issued before the 31st December, 1883, would destroy his whole vested right under the Statute of Westminster, and would, for every practical and substantial purpose, give the enactment as against him a retrospective operation. This is not at all like the operation of the 145th section, which (assuming it to apply to pending executions) only regulates in a just and reasonable manner the exercise of the right, and does not take the right away.

I pass from the 146th to the 169th section of the Act, which appears to me to show positively that the legislature did not intend to take away under the circumstances of this case the creditor's right. That section expressly repeals various enactments to the extent mentioned in the schedule, one of which is "the Statute of Westminster the 2nd, Chapter 18, in part, namely, the words, 'all the chattels of the debtor saving only his oxen and beasts of the plough;'" and those who think it improbable that the legislature could have devoted more clauses or more words than were necessary to the accomplishment of substantially the same object, meet here with an express repeal of those words in the Statute of Westminster, which on any possible construction of the 146th section (except that which would make it throughout and exclusively retrospective) had been altogether deprived of their whole force and effect by the 146th section. If the principle *ex abundanti cautela* is sufficient (as I think it is) reasonably to explain this, much more is it sufficient to explain the addition in sub-section (1) of section 146 of the words dealing with the form of the writ of *elegit* to the previous words dealing with the substance of the remedy.

It is, therefore, in my opinion clear that the legislature has by this section thought it right to confirm and corroborate, by way of express repeal of the particular words relating to chattels in the Statute of Westminster, expressly to preserve the creditor's right in the present case. The material savings are these:—"The repeal effected by this Act shall not affect (a) anything done or suffered before the commencement of this Act under any enactment repealed by this Act; nor (b) any right or privilege acquired or duty imposed or liability or disqualification incurred under any enactment so repealed." It is to be observed that these savings apply in terms to the repeal effected "by this Act," not specifying that particular section only. Upon that distinction, however, I do not lay stress; because, being satisfied that the repealing clause and the 146th section ought to be read together, and that the repeal adds nothing substantially to the effect of that section, I am unable to give the saving any narrower construction than it would have had if the repeal with the saving (so far as relates to the Statute of Westminster) had been added immediately after the

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words "The sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods" in the 146th section itself.

It was argued that savings from a repealing clause would not apply to any express antecedent provision of the Act inconsistent with them, and to this I agree. But the fallacy of that argument (as it seems to me) is this, that it assumes an inconsistency which I do not find to exist. There are no words in section 146 which expressly say, or from which it can (to my mind) be reasonably inferred, that any such rights as are saved by section 169 were intended to be taken away in the particular case of creditors who had obtained writs of elegit before 1st January, 1884. On the contrary, the general principle expressed in the maxim "*Omnis nova constitutio*," &c., to which I have already referred, militates against the supposition that the words of section 146, even if they stood alone, ought to have been so construed. I find, then, in section 169 an express enactment that the repeal of the words as to the delivery of chattels in the Statute of Westminster shall not affect any right acquired or duty imposed under them. The execution creditor had, under the words of that statute, where unrepealed, acquired a right to the delivery of the goods seized, and a duty was imposed by the same words upon the sheriff to deliver them to him. That right and that duty are, in my opinion, expressly preserved; and under these circumstances, much as I regret to find myself differing from judges for whose opinion I have the very highest respect, I cannot hesitate to say that I think the order appealed from erroneous, and that it ought to be reversed.

THE MASTER OF THE ROLLS:

When this case was argued before my brother Bowen and myself I thought that the point raised, which was a point raised upon a new statute, was one of general interest and was one of great difficulty, and thereupon I decided that the case might be argued, if the whole Court would consent, before a full Court of the Court of Appeal. I hope that when such circumstances again arise the full Court will exercise the power it has of sitting.

The more I hear of this case, and the more I have considered it, the more difficult and doubtful has this point appeared to me.

But I have come to the conclusion, though with great doubt and hesitation, that the legislature in this Act intended to be verbose and tautologous, and those who drafted this Act intended to say the same thing twice over. Having come to that conclusion, the interpretation must follow. I desire most emphatically to say that I can be no party to consenting to weaken or do away with an acknowledged rule of construction of statutes unless in extreme cases. I think this is an extreme case. But I take leave to enter my most earnest protest that this mode of drafting Acts of Parliament does not conduce to clearness. I cannot disagree from the judgment.

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BOWEN, L. J. :

The question to be decided in the present case is whether the provisions as to writs of *elegit* of the Bankruptcy Act, 1883, affect a writ which has been issued and under which the sheriff had seized before the coming into operation of the Act on the 1st January, 1884.

At common law the writ of *elegit*, like other writs of execution, would probably bind the debtor's goods from the date of its issue, but by the Statute of Frauds it was provided that no writ of execution should bind the property of the goods but from the time of its delivery to the sheriff. Under a writ of *elegit* the sheriff was directed to deliver the goods to the creditor to satisfy the debt. But a direction to deliver implies an authority to seize. And it was held in the Court of Appeal in *Ex parte Abbott* (L. R., 15 Ch. Div. 447) both that the sheriff is entitled to seize the debtor's goods under a writ of *elegit* at once before the holding of the inquisition, and also that from the time of such seizure the creditor becomes a secured creditor.

The Bankruptcy Act of 1883 puts an end for the future to the operation of writs of *elegit* so far as goods and chattels are concerned. The question in the present case is how far the language in which this salutary alteration of the law has been expressed affects the case of writs under which, on January 1st, 1884, there had been a seizure but no delivery. The sections which apply to it are sections 146 and 169. The first observation to be made on section 146 is, that the writ of *elegit* is not abolished altogether,

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but is only restricted in future to lands. In the second place it is to be remarked that the words of the section are couched in the very widest form. In spite of this generality of expression, even if the words stood alone, we should still be bound to search for such a construction to be put upon them as would neither prejudicially affect vested rights nor render abortive the legal effect of things already done. A writ of *elegit* upon seizure under it by the sheriff has begun to operate, and a vested right has been thereby acquired, unless it was the intention of the legislature to destroy it. The difficulty, however, of placing a restricted construction upon section 146, so as to respect the rights of a creditor who had already seized between the passing of the Act and its coming into operation, arises principally from the fact that the subject of writs of *elegit* is again specifically dealt with in section 169. This latter section repeals so much of the Statutes of Westminster the Second, chapter 18, as relates to the debtor's chattels, saving, however, any right or privilege already acquired. It was forcibly argued before us that the effect of this latter section taken alone being of itself to prevent goods and chattels being taken in execution under any writ of *elegit* issued after January 1st, 1884, it followed as a matter of reasoning that the enactment contained in section 146 would have nothing at all on which to operate unless it was intended expressly to apply to cases where the execution has begun but had not been perfected by delivery before that date. It appears to me that the answer to this somewhat formidable argument is to be found in a study of the framework of the Bankruptcy Act, 1883, so far as it works a repeal of previous legislation. It does not seem to me possible, under the scheme adopted, to treat the repealing section 169 as an independent section or one intended to do more than to repeal expressly in a group those portions of previous statutes which had already been repealed by implication in the body of the Act. This appears to be the scheme of drafting. The mere fact, therefore, that an express repeal of certain provisions as to *elegit* is contained in section 169 would not be an argument for putting on the earlier sections any construction which they would not independently demand. I think that the words with which the saving clause in section 169 begin, viz., "The repeal effected by this Act shall not affect any right, &c., acquired

under any enactment so repealed," are large enough, whether so designed by the draftsman or not, to save vested rights both against the operation of section 169, the general repeal clause itself, and also against that of the previous clauses of the Act. I also think, even without the saving clause, that section 146, unless it is to receive some special force from the co-existence of another clause, may itself receive a reasonable construction which would except from its operation writs under which, prior to January 1st, the sheriff had already seized. Both the recognized rule that statutes should be interpreted, if possible, so as to respect vested rights, and it may be the effect of the saving clause in section 169 itself would be to withdraw from the operation of section 146 all writs which, like the present, were already in force prior to January 1st. For these reasons, though I do not think the matter perfectly free from doubt, I have arrived at a distinct conclusion that the judgment of the Court below should be reversed.

Lord Justice Cotton desires me to say that he agrees with the rest of the Court, that the judgment appealed from must be reversed.

Solicitors: *Lyne & Holman* for the judgment creditor.

Ingledew & Ince for the debtor.

Maynard for the sheriff.

CASES relied upon or referred to in the arguments and judgments:—

Payne v. Drewe, 4 East, 523.

Clerk v. Withers, 6 Mod. Rep. 293, 299, 300.

Ex parte Abbott, In re Gourlay, L. R., 15 Ch. Div. 447.

Giles v. Melsom, L. R., 6 H. L. Cas. 24.

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PRACTICE.

BEFORE
MR. REGIS-
TRAR PEPYS.

1884.

Jan. 22.

IN RE WILLIAM WILLIAMS.

Bankruptcy Act, 1883, Section 17, Sub-section 9.

Public Examination: First Meeting of Creditors not concluded.

Held: That the public examination cannot be concluded until the adjourned first meeting of creditors has been concluded.

THIS was the first public examination under the Bankruptcy Act, 1883.

The debtor, *William Williams*, had presented a petition against himself.

The first meeting of creditors had been summoned, but was adjourned owing to the absence of a quorum.

W. W. Aldridge, the official solicitor, said :—

The examination of the debtor must necessarily be adjourned. The first meeting of creditors has not been concluded. (Bankruptcy Act, 1883, s. 17, sub-s. 9.)

PEPYS, REGISTRAR :

The Bankruptcy Act, 1883, section 17, sub-section 9, says that an order declaring that the public examination of a debtor is concluded shall not be made “until after the day appointed for the first meeting of creditors.” The section, in fact, provides that the public examination shall not be concluded before the day fixed for the first meeting, but that is a very different thing to the conclusion of the first meeting. It does not necessarily follow that the examination must be adjourned until after any adjournment of the first meeting. A first meeting might be adjourned from time to time, and it might add very greatly to the expense if the public examination were obliged to be adjourned in the same way. The point is a very important one, and the matter had better stand over for a week for consideration.

January 29th.

PEPYS, REGISTRAR :

Last week I expressed some doubt upon the question of adjourning the public examination in cases where the first meeting has been adjourned. Since that time I have considered the matter I am now clearly of the opinion that in no case ought the public examination to be concluded until the adjourned meeting is concluded.

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IN RE
WILLIAM
WILLIAMS.
Jan. 29.

JURISDICTION.

IN RE EVAN JONES.

Bankruptcy Act, 1883, Sections 94, 99 and 169—Bankruptcy Rules, 1883, Rule 264.

Delegation of Judge's Authority—Jurisdiction of Registrar—Pending Business.

BEFORE
MR. JUSTICE
MATHEW.
1884.
Jan. 29.

Application to the registrar on behalf of the trustee in a bankruptcy under the Bankruptcy Act, 1869, that a solicitor should pay over to such trustee certain moneys alleged to be in his hands and to belong to the bankrupt's estate.

Objection.—That under the terms of the Bankruptcy Act, 1883, the registrar had no jurisdiction to hear the application.

Held.—That the registrar had jurisdiction.

IN the year 1871, on the death of one *Hugh Jones*, letters of administration of his estate were granted to *Evan Jones* and a *Mrs. Cheverton*, and as a large sum of money was required for carrying out the administration, *Evan Jones* and *Mrs. Cheverton* handed such sums to *A. F. Barnard*, a solicitor, who paid 3,160*l.* into the Inland Revenue Office for administration purposes.

In November, 1875, *Evan Jones* was adjudicated a bankrupt.

In 1878, the surplus sum of 3,000*l.* remaining after payment of the succession and other duties in the administration of *Hugh Jones* was, upon the application of *A. F. Barnard*, returned to him by the Inland Revenue Office.

On January 24th, 1884, an application was made by the trustee in the bankruptcy of *Evan Jones* to Mr. Registrar *Haslitt* for an

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order that this sum of 3,000*l.* should be paid over to him by *A. F. Barnard* as a portion of the estate of the bankrupt.

On that occasion the preliminary objection was taken that under the terms of the Bankruptcy Act, 1883, the registrar had no jurisdiction to entertain the application.

The question was thereupon referred to Mr. Justice MATHEW, as the acting bankruptcy judge, for determination.

Kirby for the trustee.

Section 67 of the Bankruptcy Act, 1869, authorized the chief judge to delegate certain of his powers to the registrar; and this was done by an order of *Bacon, C. J.*, issued in 1870. The powers thus delegated, amongst which was the power of dealing with this application, still continue. By section 169 of the new Act of 1883, proceedings under the Bankruptcy Act, 1869, pending at the commencement of the Bankruptcy Act, 1883, are to continue as if the new Act had not passed. And by Rule 264 of the Bankruptcy Rules, 1883, "In any proceeding commenced under the Bankruptcy Act, 1869, or any previous bankruptcy Act, a registrar shall, unless and until the judge otherwise orders, continue to have and exercise all powers and jurisdiction (not otherwise provided for by the Act or these Rules) which he had by delegation or otherwise at the commencement of these Rules."

E. C. Willis, Q.C., for *A. F. Barnard*.

Rule 264 of the Bankruptcy Rules, 1883, is *ultra vires*. Under the Act of 1869 the registrar would doubtless have had jurisdiction in this matter, but the power of delegation possessed by the late chief judge was entirely a personal one, and came to an end when his office ceased to exist. The chief judge in bankruptcy is officially dead, and a ghost cannot delegate his authority. Section 94, subsections 1 and 2 of the Bankruptcy Act, 1883, are to be looked to in considering the present case; and, by these, pending business is expressly assigned to the judge. Further, by section 99, the jurisdiction in bankruptcy of the registrars is defined, and no mention is made of pending business. The words of section 169, subsection 3, are "notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrange-

ment, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act, shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue; and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto as if this Act had not passed." The insertion of the words "except so far as any provision of this Act is expressly applied to pending proceedings" conclusively shows that it was intended to preserve the full effect of section 94, and also of section 99, and to except from its operation pending business as defined in section 94.

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Kirby in reply.

Judgment reserved.

MATHEW, J.

Jan. 30.
Judgment.

In this case the debtor, *Evan Jones*, filed his petition in 1875, and on January 24th of the present year application was made on behalf of the trustee in the bankruptcy to the senior registrar that *Mr. Barnard*, a solicitor, should pay over to the trustee a sum of 3,000*l.* alleged to be in his hands, and to belong to the bankrupt's estate. The objection was taken, however, that the registrar had, under the terms of the Bankruptcy Act, 1883, no jurisdiction to entertain the application; and this question has been referred to me for determination. The question is one of considerable importance, because if the objection is well founded, it will greatly affect the transaction of bankruptcy business with regard to pending proceedings, not only in London, but also in all the local Courts having jurisdiction in bankruptcy throughout the country. On behalf of the trustee it has been argued that the registrar has jurisdiction to hear the application. In support of that argument, section 67 of the Bankruptcy Act, 1869, has been referred to, by which power was given to the chief judge to delegate certain of his duties to the registrar. The general rule was also referred to,

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which had been made by the late chief judge, by which the power of dealing with this application, amongst other duties, was transferred to the registrar; and it is not disputed, that if the Act of 1869 was still in operation, the registrar would have full power to deal with this application. Reference was also made to section 169 of the Bankruptcy Act, 1883, and especially to Rule 264 of the General Rules made in pursuance of that Act, by which, with respect to pending business, any powers which the registrars possessed, whether by delegation or otherwise, before the new Act came into operation, are expressly preserved. On the other hand, it has been argued that Rule 264 is *ultra vires*. It was contended that by sections 94 and 99 of the new Act of 1883, the delegated powers under the Act of 1869 have ceased, and that the registrars possessed, not only with regard to any proceedings which might arise under the new Act, but also with regard to pending proceedings, those powers alone which are given to them by the new Act, and which do not include the power to deal with this application. It was said that the office of chief judge of the London Bankruptcy Court no longer exists, and that the registrars have become registrars of the High Court. In other words, that these sections 94 and 99 of the new Act have effected a complete repeal of the Act of 1869, so far as it conferred jurisdiction upon the registrars under the powers delegated to them by the chief judge; and that section 169 must give way to these earlier sections. But I think that section 169 is the governing section, and furnishes the key to the interpretation of the Act. Section 169, sub-section 3, commences "notwithstanding the repeal effected by this Act," and this must in my opinion apply to all previous sections of the Act having a repealing nature, as sections 94 and 99 clearly have. Attention was also called to an exception in the section 169, "except so far as any provision in this Act is expressly applied to pending proceedings," and it was contended that this exception included section 94. I do not think, however, that section 94 was intended to be referred to in that section. It appears to have been the intention of the legislature that the jurisdiction of the registrars with reference to proceedings pending under the Act of 1869 should be maintained, and that such pending proceedings should go on as formerly. Rule 264 has been framed for the purpose of

carrying out that intention. I am of opinion, therefore, that the jurisdiction to deal with this matter is in the registrar, and must be remitted to him to be decided upon the merits.

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JONES.

Solicitors: *Ashurst, Morris & Crisp* for the trustee.
Barnard for A. F. Barnard.

PRACTICE.

IN RE C. G. LANDROCK.

Bankruptcy Act, 1883, Section 17, Sub-sections 4 and 5.

Held.—That a solicitor appearing for a creditor at the public examination of a bankrupt, for the purpose of examining the bankrupt as to his affairs, need not be authorized in writing.

BEFORE MR.
REGISTRAR
HARVEY.
1884.
Jan. 31.

THE bankrupt, *C. G. Landrock*, appeared to pass his public examination.

Raphael, solicitor for certain creditors, desired to examine the bankrupt concerning his affairs.

Goldberg, solicitor for the bankrupt, objected.

A solicitor for a creditor has no *locus standi* under the Bankruptcy Act, 1883, unless authorized in writing. (Section 17, sub-section 4.)

By section 17, sub-section 5, "The official receiver shall take part in the examination of the debtor; and for the purpose thereof, if specially authorized by the Board of Trade, may employ a solicitor with or without counsel."

And by sub-section 4 of the same section 17, "Any creditor who has tendered a proof, or his representative, authorized in writing,

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may question the debtor concerning his affairs and the causes of his failure."

The words "representative authorized in writing" are express, and apply to the case of a solicitor appearing for a creditor, who must produce such authority.

HAZLITT, REGISTRAR :

The words of section 17, sub-section 4, appear to be in favour of the proxy. I am of opinion, however, that the section is not intended to operate so as to exclude a solicitor who appears for a creditor.

BEFORE
MR. JUSTICE
CAVE.
1884.

IN RE WINDAS AND DUNSMORE, EX PARTE HOUGH.

Bankruptcy Act, 1883, Sections 45, 146 and 169.

Feb. 18 & 25.

Question.—Whether, in a case where possession of the goods of a debtor had been taken by the sheriff under a writ of *elegit* on December 22nd, 1883, but no delivery had been made to the judgment creditor prior to the debtor being adjudicated a bankrupt under the Bankruptcy Act, 1883, which came into operation on January 1st, 1884 (by which it is provided that writs of *elegit* shall no longer extend to goods; and, further, that an execution against goods must be completed by seizure and sale in order to entitle the creditor to the benefit of the execution in case of the debtor's bankruptcy), the judgment creditor was still entitled to delivery of the goods seized.

Held.—That the judgment creditor was not deprived of his right to the delivery of the goods.

THIS was an application on behalf of one *E. J. Hough*, to discharge an order made by Mr. Registrar *Pepys* restraining the said *Hough*, as judgment creditor, and the sheriff, until three days after the first meeting of creditors, from proceeding under a writ of *elegit* in favour of the said *Hough*.

On May 31st, 1883, judgment was recovered against the debtors by *Hough* for the sum of 2,300*l.* On December 20th, 1883, a writ of *elegit* was issued, and on December 22nd possession of the goods was taken by the sheriff.

On January 1st, 1884, when the Bankruptcy Act, 1883, came into operation, no inquisition had been held, and the goods seized had not been delivered to the creditor.

By section 146 of the Bankruptcy Act, 1883, it is provided that "the sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods." And by section 169 certain enactments are repealed from the commencement of the Act, which are described in the 5th schedule of the Act, and, amongst these, the statute 13 Edw. I. c. 18 (the Statutes of Westminster the Second. Execution either by levying of the lands and goods, or by delivery of the goods and half the land, at the choice of the creditor), *in part*, namely, the words "all the chattels of the debtor, saving only his oxen and beasts of the plough," is included.

But by sub-section 2 (b) of the same section 169, such repeal shall not affect "any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed."

The question whether the sheriff was entitled to deliver the goods to the creditor after January 1st, of which he had taken possession before that date, was argued before the Court of Appeal on January 18th, 1884 (see Report, *ante*, p. 1); and judgment was given in favour of the judgment creditor on January 30th, reversing a previous order of the Divisional Court, which had directed the sheriff to withdraw.

Since the appeal, however, the debtors, *Windas and Dunsmore*, had been adjudicated bankrupts, and the question had arisen whether, in the face of the bankruptcy intervening between the seizure and delivery, and looking at the provisions of section 45 of the Bankruptcy Act, 1883, by which it is enacted that an execution against goods must be *completed* in order to entitle the creditor to the benefit of the execution in case of the debtor's bankruptcy, the judgment creditor was still entitled to the benefit of the writ of *elegit*.

Douglas Walker for the judgment creditor.

The creditor in possession under a writ of *elegit* possesses all the rights he would have possessed under the Bankruptcy Act of

1884.
IN RE
WINDAS AND
DUNSMORE,
EX PARTE
HOUGH.

1884.
 IN RE
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 EX PARTE
 HOUGH.

1869, notwithstanding the passing of the Act of 1883. [*In support of this contention, counsel referred at great length to the written judgments of the Lord Chancellor, the Master of the Rolls and Bowen, L. J., delivered in Hough v. Windas in the Court of Appeal* (see *ante*, p. 6), *the greater part of which judgments he read at length.*] The effect of those judgments is, that all rights of a creditor under a writ of elegit are preserved. By the case of *Ex parte Abbott, In re Gourlay* (L. R., 15 Ch. Div. 447), it is clear that from the time of the seizure by the sheriff under a writ of elegit, the creditor becomes a secured creditor; and that section 87 of the Bankruptcy Act, 1869, has no application to the seizure of goods under an elegit. Against this application section 45 of the Bankruptcy Act, 1883, will doubtless be relied upon. That section provides, “(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor: (2) for the purposes of this Act an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.” It will be argued that by this section 45, the right of the judgment creditor is taken away, and that an execution against goods must be completed by seizure and sale. To this, I submit, there are two objections—(1) by the judgments given in the Court of Appeal, section 169 of the Bankruptcy Act, 1883, preserves all the rights which the judgment creditor before possessed; and (2) section 45 does not apply to a writ of elegit. Under a writ of elegit no sale takes place.

Herbert Reed for the official receiver.

I ought first to state to your Lordship, in justice to the learned registrar, that the order in question was made by him solely with the object that this point might be raised before you. I would

submit that the order of the Court of Appeal to which reference has been made does not conclude the case. There was no bankruptcy when that order was made. There were no rights except those of the debtor and the rights of the judgment creditor. Now the rights of the general creditors have to be considered. The whole scope of the new statute is that there may be an equal distribution of the property. In the present case the adjudication took place on January 31st. On adjudication, until the appointment of a trustee, the property vests in the official receiver. (Bankruptcy Act, 1883, sections 20 (1), 54 (1).) The property was the property of the bankrupt at the time of the adjudication. Seizure does not vest the property in the creditor. (*Giles v. Grover*, 9 Bing. 128.) Therefore this property vests in the trustee, and the rights of the creditor (if any) must arise under a special Act of Parliament. But under the Act there is no reservation at all. It is contrary to all the professed objects of the Act, which is to secure an equal distribution. Further, under section 45 of the Bankruptcy Act, 1883, the execution has not been completed: there has been no delivery. The case of *Ex parte Abbott, In re Gourlay* (L. R., 15 Ch. Div. 447), turns entirely upon section 87 of the Bankruptcy Act, 1869. By *Ex parte Vale, In re Bannister* (L. R., 18 Ch. Div. 137), the delivery to the execution creditor of goods seized by the sheriff under an *elegit* at the value appraised on the inquisition is a sale of the goods within the meaning of section 95, sub-section 3 of the Bankruptcy Act, 1869, and is protected by that sub-section if the creditor had not at the time of the delivery notice of any act of bankruptcy committed by the debtor prior to the seizure and available against him for adjudication. Thus delivery is equivalent to and in effect a sale of the goods. Section 45, sub-section (2), where it provides that "an execution against goods is completed by seizure and sale," must in the case of an *elegit* be read as seizure and "delivery." In the present case there has been no delivery and the execution has not been completed.

Judgment reserved.

1884.
 IN RE
 WINDAS AND
 DUNSMORE,
 EX PARTE
 HOUGH.

1884.
 IN RE
 WINDAS AND
 DUNSMORE,
 EX PARTE
 HOUGH.
 Feb. 25.
 Judgment.

CAVE, J. :

In this case a writ of elegit was issued on December 20th, 1883 ; and on December 22nd, possession of the goods of the debtor was taken by the sheriff. No delivery has been made, however, and on January 31st, 1884, the debtor was adjudicated bankrupt. The Court of Appeal decided in the case of *Ex parte Abbott* (L. R., 15 Ch. Div. 447), that from the time of the seizure by the sheriff under a writ of elegit the creditor had a specific interest in the goods. The Court of Appeal also decided in the case of *Hough v. Windas* (see *ante*, p. 1), that the creditor is not deprived of his right to delivery notwithstanding the provisions of sections 146 and 169 of the Bankruptcy Act, 1883. The question now to be considered is whether an adjudication of bankruptcy of the debtor intervening between the seizure and delivery affects the rights of the creditor. It was contended that under section 45 of the Bankruptcy Act, 1883, the execution had not been completed. I am of opinion, however, that section 45 does not apply to writs of elegit which, so far as they extend to goods, are abolished by section 146, but only to the other forms of execution. The case is also, I think, concluded by the judgments given in *Hough v. Windas* in the Court of Appeal. It is clear, looking to the whole Act and to the judgments in *Hough v. Windas*, that the rights of a creditor who has seized, but to whom the goods have not been delivered, are intended to be governed, not by section 146, but by the temporary provisions contained in section 169, and therefore my judgment will be in favour of the judgment creditor.

Herbert Reed :

I ask that the costs may be paid out of the estate. I appear for the official receiver. The official receiver is not a litigant. He merely wished the point settled.

Douglas Walker :

I do not object. I should have thought, however, after the judgment given in *Hough v. Windas* in the Court of Appeal that the point was not a doubtful one.

CAVE, J. :

I think that this is a case in which the costs should come out of the estate.

EX PARTE PRATT, IN RE PRATT.

Bankruptcy Act, 1883, Sections 4 and 5; and Section 169, Sub-sections 1, 2 (a), (b) and 3.

COURT OF
APPEAL.

BEFORE
COTTON, L.J.,
BOWEN, L.J.,
FRY, L.J.

1884.

Feb. 22.

Held:—(1) That where a debtor had committed an act of bankruptcy under the Bankruptcy Act, 1869, and no proceedings in bankruptcy had been taken against him prior to January 1st, 1884, when the Bankruptcy Act, 1883, came into operation, proceedings in bankruptcy under the Bankruptcy Act, 1883, might be taken against such debtor founded on the act of bankruptcy previously committed.

(2) That where proceedings in liquidation were pending on January 1st, 1884, which afterwards came to an end, proceedings to obtain an adjudication against a debtor founded on the act of bankruptcy committed by him by filing the liquidation petition might be taken under the Bankruptcy Act, 1883.

THIS was an appeal from the decision of the judge of the Birmingham County Court.

A petition in liquidation under the Bankruptcy Act, 1869, was filed by the debtor *Pratt* on November 30th, 1883, and thereby an act of bankruptcy under the Act of 1869 was committed.

The first meeting of creditors was held, and an adjournment took place to January 2nd, 1884.

On January 2nd the creditors met, but separated without passing any resolution.

The proceedings therefore came to an end.

On the next day, January 3rd, 1884, a bankruptcy petition under the Bankruptcy Act of 1883, founded on the act of bankruptcy committed under the Bankruptcy Act, 1869, by the filing of the liquidation petition by the debtor, was presented by a creditor, and application was made to the County Court at Birmingham for a receiving order under section 5 of the Bankruptcy Act, 1883.

The learned judge, although expressing some doubt as to his power under the circumstances, finally made the receiving order asked for.

The debtor now appealed.

1884.
 EX PARTE
 PRATT,
 IN RE PRATT.

Cooper Willis, Q.C. (H. Stubbins with him), for the debtor.

(1) A proceeding in bankruptcy under the Bankruptcy Act, 1883, cannot be founded on an act of bankruptcy committed before that Act came into operation.

(2) Section 169 of the Bankruptcy Act, 1883, so operated as to keep alive the pending liquidation proceedings. The proper and only means of obtaining an adjudication was under sub-section 12, section 125, of the Bankruptcy Act, 1869.

In the course of the argument the following sections of the Bankruptcy Act, 1883, were referred to:—

Section 4.—“(1) A debtor commits an act of bankruptcy in each of the following cases” (therein specified).

Section 5. “Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate.”

Section 169.—“(1) The enactments described in the fifth schedule are hereby repealed as from the commencement of this Act to the extent mentioned in that schedule. (2) The repeal effected by this Act shall not affect (a) anything done or suffered before the commencement of this Act under any enactment repealed by this Act; nor (b) any right or privilege acquired, or duty imposed, or liability or disqualification incurred under any enactment so repealed. (3) Notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto as if this Act had not passed.”

Creed, for the petitioning creditor, was not called upon.

COTTON, L. J. :

Judgment.

Section 5 of the Bankruptcy Act, 1883, does not *expressly* provide that the act of bankruptcy upon which a petition is founded must

have been committed after that Act came into operation. That is admitted. But it has been pointed out that the words used in the new Act are "commits an act of bankruptcy," and from that it has been argued that section 5 only applies to those acts of bankruptcy which are committed after the Act came into operation. There is a notable difference between the terms employed in defining acts of bankruptcy in the new Act and those which were used for the same purpose in section 6 of the Bankruptcy Act, 1869. All the acts of bankruptcy in section 6 of the Bankruptcy Act, 1869, are defined in the past tense—that the debtor "has done" the things therein mentioned. The right to obtain an adjudication could only arise on showing that one of those acts had been done by the debtor. But section 5 of the new Act says, "if a debtor commits an act of bankruptcy the Court may," &c. It does not say one of the acts of bankruptcy specified in this Act. I am of opinion that it applies to all those acts which were made acts of bankruptcy previously to the commencement of the new Act, as well as to those acts which are made acts of bankruptcy under the new Act. I do not think it can be argued that the word "commits" shows that section 5 was intended to apply only to acts of bankruptcy committed after the Act came into operation. I am of opinion that it applies to those cases where, at the time when a petition is presented, an act has been committed by the debtor, and something has been done by him which is made an act of bankruptcy, whether under the new Act of 1883 or under some previous enactment. With regard to the other question which has been raised, I do not think that the rights and liabilities preserved by section 169 of the Bankruptcy Act, 1883, are intended to include the right of a creditor to present a petition or the liability of the debtor to be made a bankrupt under the Bankruptcy Act, 1869. Various acts of parliament by which certain rights have hitherto been given to creditors—as, for example, the right to take the goods of a debtor under a writ of *elegit*—have been repealed by the new Act, and I think that section 169 refers rather to rights and liabilities of this kind. Turning to sub-section 3 of section 169, it is true there were pending liquidation proceedings in the present case when the new Act commenced, and those proceedings might have continued or the debtor might have been made bankrupt under sub-section 12 of section 125

1884.
 EX PARTE
 PRATT,
 IN RE PRATT.

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EX PARTE
PRATT,
IN RE PRATT.

of the Bankruptcy Act, 1869. But if the liquidation proceedings fell through, any creditor might, under the Act of 1869, present a separate bankruptcy petition, and I cannot see why a creditor should be prevented from presenting a petition merely because the proceedings happened to be pending when the new Act came into force. I am of opinion that the creditor would not be deprived of this right.

BOWEN, L. J. :

I am also of opinion that a receiving order may be made both in respect of an act of bankruptcy committed before the new Act came into operation as well as in respect of an act of bankruptcy committed after its commencement. Unless this were so, in certain cases neither an adjudication nor a receiving order could be made, and certain acts of bankruptcy would be passed over merely because no proceedings had been taken before the new Act came into force. The inconvenience which would thus arise adds strength to the decision arrived at from the words of the Act itself. I also agree that the right of a creditor to present a petition and the liability of a debtor to be made a bankrupt under the Act of 1869 are not such rights as are preserved by section 169 of the Act of 1883.

FRY, L. J., concurred.

Solicitors: *Sargent & Son*, Birmingham.

J. Fallows.

PRACTICE.

EX PARTE CHINERY, IN RE CHINERY.

COURT OF
APPEAL.*Bankruptcy Act, 1883, Section 4, Sub-section 1 (g).*BEFORE
COTTON, L.J.,
BOWEN, L.J.,
FRY, L.J.

1884.

Feb. 22.

IN this case the question was whether a garnishee order absolute obtained under Order XLV. of the Supreme Court of Judicature Acts was a final judgment against the garnishee within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, so as to make the failure to comply with a bankruptcy notice founded upon it an act of bankruptcy on the part of the garnishee.

It had been held by Mr. Registrar *Murray* that such an order was a final judgment.

The garnishee appealed.

Held—That the words “final judgment” in section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, must be construed in their strict technical sense of a judgment in an action which established a liability previously existing of a debtor to a creditor.

E. J. Davis for the appellant.

R. Vaughan Williams for the judgment creditor.

Solicitors: *B. Davis.*

T. Ingle.



PRACTICE.

BEFORE
MR. JUSTICE
CAVE.
1884.
March 3.

IN RE F. H. JOHNSTONE, EX PARTE ABRAHAM.

Bankruptcy Act, 1883, Section 99, Sub-section 2 (e); Sections 9, 10 and 102.

Held.—That an injunction restraining a person, not a party to the bankruptcy proceedings, from dealing with property of the debtor claimed under a bill of sale, the validity of which is disputed, ought not to be granted without requiring an undertaking to be given for damages by the person obtaining the order.

Ex parte Anderson, In re Anderson, L. R. 5 Ch. App. 473, followed.

THIS was an application on behalf of one *Henry Nathan Abraham*, to discharge an injunction granted by the registrar restraining the said *Henry Nathan Abraham*, as holder of a bill of sale given by the debtor *Francis Henry Johnstone*, from proceeding to realise or from otherwise interfering with the property included in such bill of sale until further order of the Court.

S. Woolf for H. N. Abraham.

Cooper Willis, Q.C., for the debtor.

S. Woolf:

Before entering upon the facts of the case, I wish to call attention to the form of the order granted by the registrar in this matter. The injunction which I now ask may be discharged was obtained *ex parte* on the application of the debtor on the very day on which the receiving order was made. The injunction order is an absolute one, "until the further order of the Court." I would submit first, that by section 99, sub-section 2 (e), of the Bankruptcy Act, 1883, the power given to the registrar is to make *interim* orders, and the order in this case should have taken that form. An interim order, as I understand it, is "until a certain day." But I do not take my stand upon that point alone. The injunction in this case was obtained *ex parte*; and it contains no

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UNDER THE

BANKRUPTCY ACT, 1883,

DECIDED IN THE

High Court of Justice & The Court of Appeal.

REPORTED BY

CHARLES FRANCIS MORRELL,

Of the Middle Temple, Barrister-at-Law.

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1884

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4, ESSEX COURT,
TEMPLE, E.C.
May 12th, 1884.

undertaking as to damages, which, according to the practice under the Bankruptcy Act of 1869, I am entitled to. In *Ex parte Anderson*, *In re Anderson* (L. R., 5 Ch. App. 473; 39 L. J., Bank. 49; 23 L. T. 274), it was laid down that "under the Bankruptcy Act, 1869, the Court of Bankruptcy has jurisdiction to grant in a summary way an injunction to restrain a person not a party to the bankruptcy proceedings from dealing with property alleged to have been fraudulently assigned before the bankruptcy; and such an injunction may be granted *ex parte* on such a case being made out as would induce the Court of Chancery to grant it upon a bill filed to impeach the assignment." But "the person obtaining such an order must give an unqualified undertaking to be answerable for damages, not merely an undertaking to be answerable for damages out of the assets; and also an undertaking to institute, within a limited time, proceedings to set aside the alleged fraudulent assignment."

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JOHNSTONE,
EX PARTE
ABRAHAM.

Section 102 of the Bankruptcy Act, 1883, defining the general power of Bankruptcy Courts, is equivalent to section 72 of the Act of 1869, and the injunction in the present case was *ex parte*, and falls under the rule laid down in *Ex parte Anderson*. Still no undertaking whatever was given, and I submit that the order ought not to have been made without such undertaking. On February 8th the debtor filed his own petition. On February 9th a receiving order was made, and on the same day the injunction was granted. It must have been granted on that day, either before or after the receiving order was made. If the injunction was granted before the receiving order was made, I submit that an undertaking for damages ought to have been required. The decision in *Ex parte Anderson* is still applicable, and the practice since that case was decided seems to have been that no *ex parte* injunction was granted until a receiver was appointed, who, with the debtor, was responsible in damages. The only difference now is, that the right of appointing any one receiver under section 13 of the Bankruptcy Act, 1869, is taken away, and the official receiver is to be interim receiver by section 10 of the new Act, and he must now take the burden.

If the injunction was granted after the receiving order was made, I contend, further, that it should not have been granted on the

1884.
IN RE F. H.
JOHNSTONE,
EX PARTE
ABRAHAM.

application of the debtor at all. The official receiver in such an event was the only person entitled to make the application (Bankruptcy Act, 1883, section 9), and he cannot stand back and allow the debtor to move.

So much for the form of the order; but, in addition to this, I submit that the injunction was obtained by concealment of facts.

[Counsel then proceeded to deal at length with the transactions between the parties.

Affidavits were read on both sides, and several witnesses examined.]

After which *Woolf* said :

The questions I submit are—

- (1) Whether this *ex parte* injunction, in the form it was (or at all), ought to have been granted, and whether we are not entitled to have it discharged, as no undertaking as to damages was given ;
- (2) Whether there was not a concealment of the real facts, and if those facts had been brought to the notice of the registrar, no injunction would have been granted ;
- (3) By the case of *Ex parte Bayly, In re Hart* (L. R., 15 Ch. Div. 223), it was laid down that the Court ought not to interfere by injunction with the exercise of the legal rights of the grantee of a bill of sale given by the debtor upon the mere suggestion that if an injunction is granted some case for impeaching the validity of the deed may be raised.

[CAVE, J.: With regard to the last point, you are assuming that you have a legal right. Some curious circumstances have been brought to light in this case. The question whether the bill of sale is a good one or not will have to be decided hereafter. I shall not deal with that point on this occasion.]

The Court ought not at any rate to interfere without providing that in case the bill of sale is held valid the holder may not lose the benefit of it. The debtor is in possession and has ousted the holder.

W. W. Aldridge, the official solicitor, in answer to the learned judge, said :

The official receiver cannot interfere. The goods comprised in the bill of sale are the whole of the debtor's property.

1884.
IN RE F. H.
JOHNSTONE,
EX PARTE
ABRAHAM.

Cooper Willis, Q.C. :

I submit that the injunction should not be dissolved entirely. I quite agree with the decision given in *Ex parte Anderson*. I think it would be a mistake if *ex parte* injunctions were granted without an undertaking as to damages. I am not in a position to give an undertaking just at the moment. What I propose is, that the case be adjourned on the understanding that the property shall not be removed pending the settlement of any question. There has been no concealment, and my claim has been consistent throughout. There is something to be eventually tried. If the case is adjourned for a week, I think I shall be prepared to offer an undertaking for damages, as well as an undertaking that the debtor shall bring the case for trial, and pay the costs if it goes against him ; and in the meantime that the property shall not be removed.

S. Woolf :

Can the debtor litigate with us after becoming bankrupt?

[CAVE, J. : I do not see why he should not. The official receiver cannot interfere. He has nothing to fight with. He cannot be expected to pay the costs out of his own pocket. Unless I allow a debtor to do this in cases of this kind, the question will never be settled.]

[After some consultation, *Woolf* stated that he was instructed to decline the terms offered.]

CAVE, J. :

I think that the injunction must be discharged. It ought never Judgment. to have been granted in the form it was, and without containing any undertaking for damages. The injunction should be an interim one over a certain day, and it should have been granted in that form. I think, also, that this injunction should be dissolved, because the debtor who opposes the application has no

1884.
 IN RE F. H.
 JOHNSTONE,
 EX PARTE
 ABRAHAM.

interest in the property, which is in the official receiver, and the official receiver has declined to interfere. I would help the debtor, but even now, instead of being ready with an undertaking, Mr. *Willis* asks that the matter may stand over for a week, to see whether he can give an undertaking or not; and that is not sufficient. That disposes of the case, except as to costs, and, with regard to costs, . . . looking at all the circumstances of the case, and that the offer made on the other side has been refused, I am of opinion that the injunction ought to be dissolved, but without costs.

Solicitors: *Indermaur & Brown* for H. N. Abraham.
Angier for the debtor.

CASES relied upon or referred to :—

Ex parte Anderson, In re Anderson, L. R., 5 Ch. App. 473; 39 L. J., Bank. 49; 23 L. T. 274.

Ex parte Bayly, In re Hart, L. R., 15 Ch. Div. 223.

BEFORE
 MR. JUSTICE
 CAVE.
 IN CHAMBERS.

1884.
 March 15.

IN RE FREDERICK WHITAKER.

Bankruptcy Act, 1883, Sections 12 and 66 (1).

Application by creditors for appointment of special manager of the debtor's estate. Refusal of the official receiver to appoint a special manager.

Held.—That the power of appointing a special manager given by section 12 of the Bankruptcy Act, 1883, to the official receiver is entirely a discretionary power; and the Court has no authority to interfere to compel an official receiver who refuses to make such appointment.

THIS was an application on behalf of creditors to a large amount for an order directing the official receiver to appoint one *Henry Wadford* as special manager of the debtor's estate.

A receiving order had been made against the debtor on February 13th.

The official receiver, in the exercise of his discretion, had con-

sidered that, under the circumstances of the case, a special manager of the debtor's estate was not necessary, and refused to make any appointment.

1884.
IN RE
FREDERICK
WHITAKER.

F. C. Willis, in support, was about to read affidavits dealing with the merits of the case.

[CAVE, J. : You must first show what authority there is for me to interfere.]

I rely on section 12 and section 66, sub-section (1) of the Bankruptcy Act, 1883. Section 12 gives power to the official receiver to appoint a special manager; and by section 66 (1), it is provided that the official receiver shall be an officer of the Court to which he is attached. An officer of the Court is subject to the direction of that Court. The official receiver has declined to appoint. I do not appeal from his decision, but I submit that he, as an officer of the Court, has not done his duty; and I come to the head of the Court in order to compel him to do it. Of course I do not use the word "duty" offensively, but in its strict and technical sense. If I shew that the official receiver has not exercised a proper discretion, the Court has power to make an order such as I require.

[CAVE, J. : You have applied to the official receiver and he has refused?]

That is so. But an officer of the Court, which section 66 (1) clearly shews the official receiver to be, is subject to the authority of the Court if he does not do what he ought to do.

[CAVE, J. : Surely he is the proper judge of what is best under the circumstances.]

I submit that the Court has power to set the matter right. Great harm might arise if the Court has not power, or will not afford assistance to alter the opinion of the official receiver when he thinks he is acting honestly and for the best, but may not in reality be doing so. In certain cases, there must be great hardship and loss to the estate, unless the Court has power to direct the official receiver to do certain things which as in this case he refuses to do. The official receiver is not a judge: he has certain duties

1884.
IN RE
FREDERICK
WHITAKER.

to perform which are given to him by the Act. If the official receiver were a judge, the proper course would be by way of appeal from his order. But his duties are not judicial, but ministerial, and are therefore subject to your lordship's directions.

CAVE, J. :

Judgment.

I am of opinion that I have no authority to hear this application. Section 12 of the Bankruptcy Act, 1883, provides that, "the official receiver of a debtor's estate may, on the application of any creditor or creditors, and if satisfied that the nature of the debtor's estate or business or the interests of the creditors generally require the appointment of a special manager of the estate or business, other than the official receiver, appoint a manager thereof accordingly to act until a trustee is appointed, and with such powers (including any of the powers of a receiver) as may be entrusted to him by the official receiver." This person appointed by the official receiver to act in his place the legislature has placed in the official receiver the liberty to grant or refuse. It is entirely a discretionary power which he may exercise or not. Section 66 of the Act only makes the official receiver an officer of the Court ; it gives me no authority to interfere. I cannot interfere upon an application which in my opinion ought not to have been made. The application must be refused.

Solicitors : *Rogers & Chave.*

PRACTICE.**IN RE PARKER AND PARKER, EX PARTE THE OFFICIAL
RECEIVER.**

BEFORE
MR. JUSTICE
CAYE.
IN CHAMBERS.
1884.
March 22.

*Bankruptcy Act, 1883, Section 10 (2)—Stay of Proceedings in Chancery
Division—Discharge and Remuneration of Receivers.*

Held.—(1) That when receivers, appointed in an action for dissolution of partnership, are discharged by order of the judge in bankruptcy, their office is to determine from the date of the order by which they are discharged.

(2) That the remuneration of such receivers shall be assessed by the registrar.

IN this case application was made on behalf of the official receiver:

- (1) For an order directing a stay of proceedings in an action for dissolution of partnership commenced by the debtor, *William Searle Parker*, against the debtor, *Frederick Searle Parker*, in the Chancery Division before Mr. Justice Kay;
- (2) That the receivers appointed in the said action be discharged and give up possession of the property of the debtors to the official receiver;
- (3) That the receivers bring in and pass their accounts in such manner and at such time as may be directed;
- (4) That any further order might be made as the judge might think fit.

This was the first instance in which the power of staying proceedings in another division of the High Court was exercised by the bankruptcy judge.

The debtors, *W. S.* and *F. S. Parker* had absconded; and on March 18th a receiving order was made against them. On March 20th adjudication took place.

On the 25th February previous, an action for a dissolution of partnership had been commenced by *W. S. Parker* against his partner *F. S. Parker*, and in this action Messrs. *Pearce* and *Sully* were appointed joint receivers.

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M. C. Chalmers for the official receiver :

IN RE PARKER
AND PARKER,
EX PARTE
THE OFFICIAL
RECEIVER.

Two questions arise on an order for a stay of proceedings in the action for dissolution of partnership being made. The first is, whether the appointment of the receivers appointed in that action is to terminate from the date of the adjudication or from the date of the order.

[CAVE, J. : From the date of the order to-day.]

The other question is in what manner the remuneration of the receivers is to be decided. I presume that is a matter for the consideration of the registrar, who will be entitled to act in a similar manner as a chief clerk in the Chancery Division.

Finlay Knight for the receivers.

CAVE, J., made an order as follows: Action stayed; possession to be given up from date of order to-day; receivers to bring in and pass accounts before the registrar; the registrar to deal with the question of costs of receivers appearing, and with the question of their remuneration; application for appointment before the registrar to be made by the official receiver.

Solicitor : *W. W. Aldridge*, the official solicitor.



BEFORE
DENMAN, J.
AND
MANISTY, J.

RICHARDSON v. WEBB.

Bankruptcy Act, 1883, Sections 146 and 168.

1884.

March 22.

Held.—That notwithstanding the provisions of section 146 of the Bankruptcy Act, 1883, a writ of elegit still extends to leaseholds.

IN this case the question was whether, looking at the provisions of the Bankruptcy Act, 1883, leaseholds could any longer be taken under a writ of elegit.

By section 146 of the Bankruptcy Act, 1883, it is provided, “(1) the sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods.”

And by section 168 (1) it is provided as follows: “‘goods’ includes all chattels personal.”

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RICHARDSON
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The sheriff in the present case had expressed an opinion that leaseholds were goods, and could not be taken under the writ, and had so directed the jury upon the inquisition.

Dodd, for the judgment creditor, moved for an order to set aside the inquisition, and to direct that a new one should be taken.

DENMAN, J.:

The sheriff has doubtless been misled by the use of the word Judgment. “goods.” The expression is not an artistic one. But in section 168 (1), the interpretation clause of the Act, “goods” are defined as including “all chattels personal.” Leaseholds are not chattels personal, but chattels real. I am of opinion, therefore, that they do not come within the definition, and that the order asked for must be granted.

MANISTY, J., agreed.

IN RE JORDAN, EX PARTE LLOYD'S BANKING COMPANY.

Bankruptcy Rules, 1870, Nos. 78 to 81—(COMPARE *Bankruptcy Rules*, 1883, Nos. 65 to 69.)

BEFORE
MR. JUSTICE
CAVE.
1884.

Inquiry into Mortgage—Equitable Mortgagees—Control of Sale—Trustee's Costs.

March 25 and
31.

Held.—That the provisions of Rules 78 to 81 of the Bankruptcy Rules, 1870 (compare Nos. 65 to 69 of the Bankruptcy Rules, 1883), were not intended to fetter the Court in cases where an application has been made to the Court by a mortgagee of property of the bankrupt for a sale of such property as provided by the rules, so as (1) to compel the Court to give the conduct of such sale to the trustee in the bankruptcy: or (2) to compel the Court to give the trustee a first charge on the proceeds of the sale for his costs and expenses in cases where the conduct of the sale has been taken away from him.

THIS was an appeal to the judge in bankruptcy from a decision of the learned judge of the Burton County Court.

Such being the case, it does not fall strictly within the reports of cases decided under the Bankruptcy Act, 1883.

1884.
 IN RE JORDAN,
 EX PARTE
 LLOYD'S
 BANKING
 COMPANY.

The portion of the Act of 1869, upon which the questions arose, however, viz.:—The Bankruptcy Rules, 1870, Nos. 78 to 81, are almost identical in form and meaning with Nos. 65 to 69 of the Bankruptcy Rules, 1883.

Under these circumstances a report of the case may be of service, and for this reason it has been included.

The order of the judge from which an appeal was now made gave, amongst other matters (1), to *Lloyd's Banking Company*, who were the equitable mortgagees of the property of the debtor *Jordan*, the full control over the sale of such property; (2) it refused to the trustee in the bankruptcy a first charge on the proceeds of the sale for the payment of his costs and expenses.

On these two points the appeal was specially based.

In October, 1883, a petition was filed against the debtor *Jordan*. The first meeting of creditors was held, and one *Harrison* was appointed trustee with a committee of inspection.

The property of the debtor consisted of a certain manufactory held on lease, and the debtor had deposited this lease with the respondent banking company, whereby they became equitable mortgagees.

A resolution was passed by the committee of inspection that *Harrison* the trustee in the bankruptcy, should sell the property and have the supervision over the sale.

Application was, however, made by the Banking Company to the County Court under No. 78 of the Bankruptcy Rules, 1870 (*compare No. 65 of the Bankruptcy Rules, 1883*), and after investigation into the circumstances the order appealed from was made.

Cooper Willis, Q.C. (*Gould* with him), for the appellant trustee.

An order thus giving the banking company the fullest power of sale is quite without precedent. It is contrary to the provisions of the Act, if the order directs that the trustee shall have nothing to do with the sale. The object of the section is, that the mortgagee has a right to an action in the Chancery Division, and then he

would have the conduct. But if he takes advantage of the Bankruptcy Act, the trustee has the conduct; and the conduct is always given in such a case to the trustee: he is the proper person to carry out the sale. There is no charge of misconduct against the trustee, and something very definite would have to be proved against him before this right could be taken away. Further, the order says that the property is to be sold "at such time and in such manner as the company shall think fit." This is most unfair. The company might keep the sale hanging over for an indefinite time. The trustee has no control; the order forces him to an entire abandonment of all supervision: the property is simply to be handed over to the creditor. But the rule says that the Court, if satisfied that there ought to be a sale, shall direct notice to be given "when and where and by whom and in what way" the property is to be sold (*compare No. 65, Bankruptcy Rules, 1883*). In this order no time or place is fixed; everything is at the discretion of the company; and I submit that it is contrary to rule and ought to be set aside. Then again the rule says: "The moneys to arise from such sale shall be applied in the first place in payment of the costs, charges and expenses of the trustee of and occasioned by the application to the Court, and of and attending such sale, &c." (*compare No. 67, Bankruptcy Rules, 1883*). It is clear that all the trustee's costs are intended to be provided for out of the money realised. But this order directs that the moneys shall be expended in paying the costs of the company and their application. The Court in fact is flying in the face of the rules, and has made a rule for itself. The order is grossly inequitable, and I ask that it be corrected. I submit that the property should be sold with the trustee's supervision over the sale, and that the proceeds should be dealt with as the rule directs.

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IN RE JORDAN,
EX PARTE
LLOYD'S
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COMPANY.

Gould followed.

Yate-Lee for the respondent banking company.

The security given to the mortgagees has proved in fact insufficient to cover the amount of the debt owed to them. Under these circumstances it is clearly to their interest to obtain the best value for their property. The trustee has no interest in the matter,

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 IN RE JORDAN,
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and the bank is clearly the proper party to have the conduct of the sale. Further, the company having already an insufficient security ought not to have to pay the costs of the trustee out of their own pocket unless absolutely compelled by the statute, more especially when the sale is under the conduct of the mortgagees, and it is to their interest to realise for as much as possible. Formerly, an equitable mortgagee had only one remedy, that of foreclosure. It was found, however, that this was often most unfair in the case of a bankruptcy, and, so long ago as 1794, Lord Loughborough drew up certain rules which are in substance now in force (*compare Nos. 65 to 69, Bankruptcy Rules, 1883*), by which power was given to realise the security. By the Chancery Amendment Act, 1852 (15 & 16 Vict. c. 86), section 48, it was also provided that the Chancery Courts could direct a sale instead of foreclosure; and the case of *Hutton v. Seely* (4 Jur., N. S. 450) decided that it was unnecessary to ask for foreclosure, but that the applicant might simply ask for a sale. Sections 65 and 66 of the Bankruptcy Act, 1869, clearly provide that "the chief judge in bankruptcy shall have all the powers, jurisdiction and privileges possessed . . . by any judge of her Majesty's High Court of Chancery, and the orders of such judge shall be of the same force as if they were . . . decrees in the High Court of Chancery." And "every judge of a local Court of Bankruptcy shall, for the purposes of this Act, in addition to his ordinary powers of a County Court judge, have all the powers and jurisdiction of a judge of her Majesty's High Court of Chancery, and the orders of such judge may be enforced accordingly in manner prescribed." With regard to the jurisdiction given by these sections in the case of *Ex parte Anderson, In re Anderson* (L. R., 5 Ch. App. 479; 39 L. J., Bank. 49; 23 L. T. 274), Sir G. M. Giffard, L. J., said: "Then we come to the 65th and 66th sections of the Act. [His lordship read the 65th section.] I think that this section clearly gives the chief judge complete jurisdiction—a jurisdiction at least as extensive as if he were sitting in the Court of Chancery, and dealing with a suit instituted by proper plaintiffs. Then the matter in the present case being in a local Court of Bankruptcy we must turn to the 66th section. [His lordship read the section.] This language is perfectly plain; it says in so many words that

a judge of a Court of Bankruptcy shall have all the powers of a judge of her Majesty's High Court of Chancery, and that the orders of such judge may be enforced accordingly in manner prescribed." Also, in the case of *Ex parte Sheriff of Middlesex In re Buck*, L. R., 10 Ch. Div. 575; 48 L. J., Bank. 33; 39 L. T. 651), it was laid down that "section 65 confers on the London Court of Bankruptcy, for the purposes of the Bankruptcy Act, all the jurisdiction formerly possessed by the superior Courts of Common Law." I submit that by these cases it is established that from the Act of 1869 an equitable mortgagee had two remedies. He might either come to the Bankruptcy Court under what I may call the Loughborough Rules, or he might come to the Bankruptcy Court and ask an order as the Chancery Courts would make the order, being more favourable. The form in which the Chancery Division makes such an order is a common one, and may be found in Seton on Decrees, 4th ed. 1128. I submit that an equitable mortgagee has now two remedies; the last being the more favourable he chooses that; he asks quick action, and that he shall not be driven to pay the costs of the trustee.

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Cooper Willis, Q.C., in reply.

Under such circumstances what would be the position of a second mortgagee? (See *Ex parte Hirst*, *In re Wherly*, L. R., 11 Ch. Div. 278; Bacon, C. J., at p. 283.) If you come into the Bankruptcy Court you come under the Bankruptcy Act and Rules. If you go into the Chancery Court you get the Chancery Rules. The costs of the trustee ought to have been provided for. The order is wrong because it has not made such provision.

CAVE, J.:

In this case I do not feel at liberty to adopt altogether the ingenious argument which has been put forward on behalf of the respondents. But I admit I do not see why the Banking Company were not the proper parties to have the conduct of the sale. The value of the property of the debtor, over which the company held an equitable mortgage, does not seem to have been sufficient to cover the full amount of the debt owed to them, and it was clearly to their interests to realise for as much as possible. The

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trustee had in reality no interest, and I am of opinion that the order of the County Court judge, giving the control of the sale to the mortgagees, is, under these circumstances, a right one. But there arises the other question of the costs of the trustee. The trustee has come to the Court of Bankruptcy and asks for such an order as is provided for by the rules. The object is that the trustee shall have an order giving him a first charge on the proceeds of the sale. Now I do not think the intention was to fetter the Court by No. 80 of the Bankruptcy Rules, 1870. (*Compare No. 67, Bankruptcy Rules, 1883.*) If it was once held that the costs of the application must be given to the trustee there might, in certain cases, be an unnecessary expense incurred. I am of opinion that it is in the discretion of the Court whether the trustee shall have the costs of the application or not; but if it does give him the costs, such costs should be paid out of the proceeds of the estate. So, also, about the sale and the trustee's expenses attending thereat; such expenses are to be paid out of the proceeds. But I think that is in the discretion of the Court. If the trustee has the conduct of the sale, the rule provides that he shall have his expenses out of the proceeds. If the trustee is not given the conduct of the sale the Court must consider what expenses he ought properly to incur, and these are then a first charge on the proceeds. If an application is made it is entirely a question for the Court.

[Certain other provisions of the order of the County Court were then dealt with, and an order was made that ten days' notice of the time and place of sale should be given to the trustee, and that a copy of the conditions of sale should be sent to him within the same period. It was also provided that the money to arise should be expended (1) "in payment of the costs of the trustee herein directed to be paid."]

The respondents have clearly a right to an order which will free them from the trustees interfering with the sale. There yet remains the question of the costs of the application. Substantially the respondents have succeeded, and the trustee must pay the costs. But as this appears to be the first case in which it has been necessary to consider the intention of the rules quoted, as regards the rights of a trustee when the conduct of the sale of the debtor's property.

has been taken away from him, he may take them out of the estate. If a similar case should arise on a future occasion, however, a different course with regard to the costs incurred may be adopted.

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Solicitors: *Geare, Son, & Pease* for the trustee.
Tucker & Lake for the respondents.

CASES relied upon or referred to:—

Hutton v. Seely, 4 Jur., N. S. 450.

Ex parte Anderson, In re Anderson, L. R., 5 Ch. App. 473; 39 L. J., Bank. 49; 23 L. T. 274.

Ex parte Sheriff of Middlesex, In re Buck, L. R., 10 Ch. Div. 575; 48 L. J., Bank. 33; 29 L. T. 651.

Ex parte Hirst, In re Wherly, L. R., 11 Ch. Div. 278.

PRACTICE.

IN RE MATTHEW, EX PARTE MATTHEW.

Bankruptcy Act, 1883, Section 4, Sub-section 1 (g)—Bankruptcy Notice—Bill given by Debtor.

COURT OF
APPEAL.
BEFORE
COTTON, L.J.,
BOWEN, L.J.,
FRY, L.J.
1884.
March 27.

Held.—That where a bill has been given by a debtor, upon whom a bankruptcy notice has been served, for the amount of the judgment debt, and has been taken by the creditor, such bill is sufficient satisfaction of the requirements of the bankruptcy notice under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to prevent such creditor afterwards proceeding to obtain a petition against the debtor on the bankruptcy notice.

THIS was an appeal to set aside a receiving order which had been made against the debtor, *J. D. Matthew*, in the Wandsworth County Court, and which it was now alleged had been made under a mistake.

The petition was based on a bankruptcy notice. The petitioners were *A. Matthew* and *C. Reid*, who had formerly carried on business in partnership, and to whom a debt of 3,800*l.* was due from the debtor on a judgment. The act of bankruptcy was the failure of

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IN RE
MATTHEW,
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the debtor to comply with the terms of the bankruptcy notice, and on this the order was made.

The debtor, *J. D. Matthew*, now appealed, on the ground that, pending the period given by the bankruptcy notice to satisfy the debt, it was satisfied by a bill given by the debtor, and taken on behalf of the firm by one of the partners.

Cooper Willis, Q.C. (Herbert Reed with him), for the appellant.

The bill given to one of the partners within the time allowed by the bankruptcy notice is sufficient satisfaction within section 4, sub-section 1 (g), of the Bankruptcy Act, 1883. That section provides that if a creditor has obtained a final judgment against a debtor for any amount, and, execution thereon not having been stayed, has served on him a bankruptcy notice under the Act requiring him to pay the judgment debt, or to secure or compound for it to the satisfaction of the creditor or the Court, and the debtor does not within the time specified, which is seven days after service of the notice in case the service is effected in England, either comply with the requirements of the notice or satisfy the Court that he has some counter-claim, then the debtor, if he fails to do this, commits an act of bankruptcy. But in this case the debtor within the time limited gave a bill. The facts are these:— In the year 1881, *A. Matthew*, a brother of the debtor, and *C. Reid*, who had for some time carried on business together as stockbrokers, agreed to dissolve partnership, but for certain purposes, especially with regard to the partnership debts, of which this debt of *J. D. Matthew* was one, all the effects of the partnership were to continue. A good deal of ill-feeling sprang up between *A. Matthew* and *Reid*; and *Reid* obtained a judgment against the debtor *J. D. Matthew*, and in January served a bankruptcy notice upon him, saying that he acted for *A. Matthew*. On this the debtor went to his brother and gave him a bill for the amount of the judgment debt, which *A. Matthew* took. I do not think this fact was communicated to *Reid*, probably on account of the ill-feeling, and *Reid* filed the petition and obtained the receiving order, which the debtor now asks shall be set aside.

[COTTON, L. J. : Does *Reid* now admit that the bill was taken on his account as well as on that of *A. Matthew* ?]

Sidney Woolf for the petitioning creditor :

I admit the authority.

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[FRY, L. J. : There are three things a debtor must do when served with a bankruptcy notice. He must either (1) pay the judgment debt ; or (2) secure or compound for it ; or (3) satisfy the Court that he has a counter-claim.]

Cooper Willis, Q.C. :

A bill is quite sufficient. It is not necessary that the debt shall be paid in hard cash. The parties took the bill as payment, and it was payment within the meaning of the Act. Anything that amounts to accord and satisfaction is sufficient.

COTTON, L. J. :

I am satisfied as to that, and I think, on the admission of the Judgment. petitioning creditor that his partner had authority to take the bill, that the order ought to be discharged. *A. Matthew* received a bill of exchange from the debtor, and it is now admitted by the petitioning creditor that on January 24th, when the bill was given, his late partner had authority to bind him by accepting that note. After that he could not go afterwards and obtain a receiving order on the bankruptcy notice because actual payment had not been made.

BOWEN, L. J. :

I am of the same opinion. I think that a man who takes a bill cannot go on on the bankruptcy notice. It is conditional payment, and until it is dishonoured no steps can be taken on it.

FRY, L. J. : I agree.

Solicitors : *C. R. Steele* for the appellant.

Spyer & Son for the petitioning creditor.



COURT OF
APPEAL.

BEFORE
COTTON, L.J.,
BOWEN, L.J.,
FRY, L.J.
1884.
March 27.

IN RE MAY, EX PARTE MAY.

Bankruptcy Act, 1883, Section 169, Sub-sections 1, 2 and 3.

Appeal from decision of registrar refusing rehearing of a bankruptcy petition with a view to the adjudication obtained under the Bankruptcy Act, 1869, being discharged, on the ground that at the time of the presentation of the bankruptcy petition the creditors' right to present it, and the liability of the debtor to be adjudicated a bankrupt under the Act of 1869, had ceased.

Held.—That although the adjudication was made on wrong grounds, and was wrong in form because it was an ordinary adjudication made upon the petition of a creditor under the Bankruptcy Act, 1869, founded on an act of bankruptcy committed by the previous filing of a liquidation petition by the debtor, and under such circumstances the proceedings ought to have been taken under the Bankruptcy Act, 1883, as was decided in *Ex parte Pratt, In re Pratt* (see *ante*, p. 27), yet the Court would have had jurisdiction to make the adjudication under section 125, sub-section 12, of the Bankruptcy Act, 1869, in consequence of the failure of the liquidation proceedings, and the bankrupt not having raised the objection in the Court below, the adjudication must stand.

THIS was an appeal on behalf of the bankrupt, *J. V. May*, from a decision of Mr. Registrar *Hazlitt* refusing a rehearing of the bankruptcy petition with a view to obtaining a discharge of the adjudication of bankruptcy on the ground of irregularity.

On December 12th, 1883, a liquidation petition in the London Bankruptcy Court was filed by the debtor, *J. V. May*, who carried on business as *J. V. May & Co.* in Wood Street, Cheapside.

The first meeting of creditors was held on December 28th, 1883, and was adjourned to January 15th, 1884.

On that day the creditors met, but separated without passing any resolution, and without any further adjournment; and the liquidation proceedings in consequence came to an end.

On January 21st, 1884, a creditor named *Dobell* presented a bankruptcy petition against the debtor, *May*, under the Bankruptcy Act, 1869, founded on the act of bankruptcy which had been committed by the filing of the liquidation petition; and on February 1st, *May* was adjudicated a bankrupt.

This procedure was in accordance with a decision in bankruptcy previously given by Mr. Justice *Mathew* in chambers in the unreported case of *In re Carr*.

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EX PARTE
MAY.

On February 22nd, however, the case of *Ex parte Pratt, In re Pratt* (see *ante*, p. 27), was argued before the Court of Appeal, and by that case it was decided (1) that where a debtor had committed an act of bankruptcy under the Bankruptcy Act, 1869, and no proceedings in bankruptcy had been taken against him prior to January 1st, 1884, when the Bankruptcy Act, 1883, came into operation, proceedings in bankruptcy under the Bankruptcy Act, 1883, might be taken against such debtor founded on the act of bankruptcy previously committed; (2) that where proceedings in liquidation were pending on January 1st, 1884, which afterwards came to an end, proceedings to obtain an adjudication against a debtor founded on the act of bankruptcy committed by him by filing the liquidation petition, might be taken under the Bankruptcy Act, 1883.

The effect of this decision, however, was not communicated to the bankrupt, *J. V. May*, until after the expiration of the twenty-one days allowed for appealing from the adjudication.

But on March 14th, an application was made by him to the registrar to appoint a day for the rehearing of the bankruptcy petition, with a view to discharging the adjudication for irregularity, on the ground that at the time of the presentation of the bankruptcy petition by the creditor *Dobell*, the creditors' right to present it, and the liability of *May* to be adjudicated a bankrupt under the Bankruptcy Act, 1869, had ceased.

This application was refused, and the bankrupt now appealed.

Cooper Willis, Q.C. (*F. Cooper Willis* with him), for the appellant.

The Court had no power to make the debtor a bankrupt under the Act of 1869. The debtor is quite willing to have a receiving order made against him. The section of the Bankruptcy Act, 1883, to which we have to look is section 169, sub-sections (1), (2) and (3). By that section the whole of the Act of 1869 is repealed. But the repeal shall not affect "any right or privilege acquired, or duty imposed, or liability or disqualification incurred under any

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enactment so repealed," and "notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act, shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto, as if this Act had not passed." If the bankruptcy petition had been pending it might have been continued under the Act of 1869. But in this case there is no such thing. This is a new petition: it was not a pending petition. The petition presented on January 21st was not *pending* on January 1st when the new Act came into operation, and it did not, therefore, come within the saving clause of section 169 of the Act. The proper course was to follow the law laid down in *Ex parte Pratt*, *In re Pratt*, and to take proceedings under the Act of 1883. There are several authorities under the old Act by which it appears that a rehearing may be granted after the time has elapsed. (*Ex parte Trickett*, *In re Brown*, L. R., 16 Eq. 391.) The Court has also full power to extend time under the Bankruptcy Act, 1883. Section 105, subsection (4).

Sidney Woolf for the petitioning creditor.

So far as I understand it, the bankrupt's objection is that he has been adjudicated bankrupt under the Act of 1869. He does not object to a receiving order being made against him under the Act of 1883. We do not accept that for the obvious reason that under the new Act the relation back of the trustee's title is much curtailed. I admit that the Court has the power of ordering a rehearing after the usual time has elapsed. But I do not think it would do so in a case like the present. The orders have not been made behind the back of the bankrupt. As a matter of fact he appeared to every order. I also submit that the order was properly made. Although *Ex parte Pratt*, *In re Pratt* (see *ante*, p. 27), decided that, under the circumstances of the case, an adjudication under the Act of 1883 was good, it did not decide that an adjudication under the Act of 1869 would necessarily be bad. Moreover, in the present case, the receiver in the liquidation was never discharged.

COTTON, L. J. :

The Court has clearly the power to order a rehearing after time ; but I am of opinion that that power should be exercised in the most careful manner. In the present case it has been urged on behalf of the appellant that the registrar had no jurisdiction to make the order appealed from in the face of section 169 of the Bankruptcy Act, 1883. That section repealed the Bankruptcy Act, 1869, but, it is important to notice, with certain "savings." In this case the liquidation petition was presented under the Act of 1869, and was pending on January 1st, and afterwards the proceedings became inoperative because no resolution was passed. But a receiver was appointed and continued, which kept the proceedings alive. Then the petitioning creditor presented a petition on the act of bankruptcy committed by the filing of the liquidation petition ; and this petition was a petition under the Act of 1869. It is now urged upon us that the order of adjudication made on this petition was made without jurisdiction. But it is to be noticed that at the time when the order was made the debtor appeared and took no objection. The question now to be considered is, Was there jurisdiction ? Sub-section 3 of section 169, of the Bankruptcy Act, 1883, says, "notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto as if this Act had not passed." And sub-section 12 of section 125 of the Bankruptcy Act, 1869, says, "if it appear to the Court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly." I am of opinion that, although the order of adjudication in the present case may have been made on wrong grounds, and was wrong in form, since it was an ordinary adjudication made upon the petition of a creditor

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under the Act of 1869, founded on the act of bankruptcy committed by the policy of the liquidation petition, and because under such circumstances the proceedings, as was decided in *Ex parte Pratt*, *In re Pratt*, ought to have been taken under the Act of 1883, still the Court would have had jurisdiction to make the adjudication under section 125, sub-section 12, of the Bankruptcy Act, 1869, in consequence of the failure of the liquidation proceedings, the power to do so being especially preserved by section 169 of the Bankruptcy Act, 1883, as to liquidation proceedings which were pending on January 1st, 1884. I am of opinion, therefore, that the Court had jurisdiction, because the proceedings had become ineffectual. There was a right to turn the liquidation into bankruptcy—the liquidation proceedings were pending on January 1st, and there was jurisdiction to make the order, if it had been made in the right way. The order was not made behind the back of the bankrupt; the bankrupt appeared in the Court below and allowed the order to be made without objection. In my opinion, therefore, as he did not then object, the bankrupt is prevented from now coming forward to ask us to allow a rehearing on the grounds stated. I see no ground for allowing a rehearing, and the adjudication must stand.

BOWEN, L. J., and FRY, L. J., concurred.

Solicitors: *Buchanan & Rogers*, for the bankrupt.

Spyer & Son, for the petitioning creditor.

PRACTICE.

IN RE COHEN, EX PARTE SCHMITZ.

COURT OF
APPEAL.*Bankruptcy Act, 1883, Section 4, Sub-section 1 (g)—Bankruptcy Notice—
Final Judgment—Order for Payment of Costs.*BEFORE
COTTON, L.J.,
BOWEN, L.J.,
FRY, L.J.

1884.

March 28.

Held.—That the fact that an order has been made against a defendant requiring him to pay the taxed costs in an action within a specified time, does not constitute such order a “final judgment” within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, so as to entitle the plaintiff, in the event of the defendant failing to comply with the terms of the order, to obtain a bankruptcy notice against the defendant founded on the order.

THIS was an appeal *ex parte* from a decision of the registrar of the Northampton County Court.

From the facts of the case it appeared that in the year 1883 an action for specific performance of a contract was brought by *Schmitz* in the Chancery Division against *Cohen*. The deeds necessary to carry out the contract were, however, afterwards executed by the defendant, and an order was in consequence made by consent that on the defendant paying the plaintiff his taxed costs in the action all further proceedings should be stayed.

The costs in the action were accordingly taxed, and an order was made on February 14th last that the plaintiff should pay the amount within four days.

This the defendant had failed to do, and on March 25th an application was made to the registrar of the Northampton County Court for the issue of a bankruptcy notice against the plaintiff founded on the order of February 14th, as a “final judgment,” in accordance with the provisions of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883.

The registrar refused to issue the notice on the ground that the order of February 14th was not a “final judgment” within the meaning of the Act.

From this decision the plaintiff now appealed.

Etherington Smith for the appellant.

1884. COTTON, L. J. :
 IN RE COHEN, I am clearly of opinion that the registrar was right. This
 EX PARTE case is really covered by the previous decision in *Ex parte Chinery*,
 SCHMITZ. *In re Chinery* (see *ante*, p. 31). It was then decided that the
 Judgment. words "final judgment in section 4, sub-section 1 (g), of the
 Bankruptcy Act, 1883, must be construed in their strict technical
 sense of a judgment in an action which established a liability pre-
 viously existing of a debtor to a creditor." The decision of the
 registrar must be affirmed.

BOWEN, L. J., and FRY, L. J., concurred.

Solicitors: *Roscoe, Hincks & Sheppard.*

BEFORE
 MR. JUSTICE
 CAVE.

1884.

March 31 and
 April 7.

IN RE JAMES PEARCE, EX PARTE THE BOARD OF TRADE.

Bankruptcy Act, 1883, Section 162.

*Application on behalf of the Board of Trade for an order directing
 trustees to pay certain undistributed funds and dividends into the Bank
 of England.*

THIS was an application on behalf of the Board of Trade for an order directing that the trustees of the estate of one *James Pearce* should forthwith pay the sum of 158*l.* 12*s.* 9*d.*, being undistributed funds and dividends remaining in their hands, into the Bankruptcy Estates Account at the Bank of England according to the provisions of section 162 of the Bankruptcy Act, 1883; and further that the said trustees should produce their books; and also submit to an audit of their accounts.

Sir Farrer Herschell (Solicitor-General) and *M. C. Chalmers* for the Board of Trade.

Swinfen Eady for the trustees.

In March, 1877, the debtor, *James Pearce*, who carried on business as a builder and contractor at Brixton Hill, became involved. A meeting of the creditors was in consequence held, at which it was resolved that his affairs should be liquidated by arrangement, and *H. A. Dubois* and *Harry Brett*, accountants, were appointed trustees under the proceedings, with a committee of inspection.

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IN RE JAMES
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From the proceeds of a sale of the stock in trade and furniture of the debtor, the sum of 199*l.* 1*s.* 1*d.* was realised, and this composed the total assets.

Of this sum 40*l.* 8*s.* 4*d.* was paid out for costs and expenses in 1877, leaving a balance of 158*l.* 12*s.* 9*d.* in the hands of the trustees.

No dividend had, however, been paid to the creditors; and, although a meeting was to have been held to give the debtor his discharge, no steps whatever were taken by the trustees until December 31st, 1883, when, in consequence of a communication made by the debtor to the Board of Trade, a notice was sent by the Inspector General in Bankruptcy requiring the trustees to pay the money in their hands into the Bank of England as provided by the Act.

On December 31st, 1883, under pressure of these proceedings, a meeting of the committee of inspection was called at which the sum of 94*l.* 17*s.* 11*d.* was voted to Mr. *Dubois* and 81*l.* 16*s.* 5*d.* to Mr. *Brett* for their remuneration. Notwithstanding that several letters had since been written by the Board of Trade, however, demanding some explanation from the trustees, no satisfactory answer was obtained, and notice was in consequence given to them on March 20th that the present application would be made to the Court.

Sir Farrer Herschell, after stating the above facts, said:—

A more scandalous case can scarcely be conceived. Nothing seems to have been done by the trustees for something like seven years, and they have, during the whole of that period, had the money in their hands notwithstanding frequent applications on the part of creditors. Then, when the notice of the authorities is called to the case, a meeting of the committee of inspection is

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 IN RE JAMES
 PRABON,
 EX PARTE THE
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 TRADE.

hastily summoned on December 31st at which the whole estate is voted away for what is said to be remuneration. The date in question was probably fixed on in the hope of escaping the operation of the new Act. But section 162 of the Bankruptcy Act, 1883, under which the present application falls, was one of those sections which came into operation immediately on the passing of the Act. By section 162, it is provided that where, after the passing of the Act, any unclaimed or undistributed funds or dividends in the hands of any trustee empowered to collect or distribute such funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition or other proceeding under or in pursuance of any such Act, have remained unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee, such trustee is required forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. And by the same section 162, sub-sect. 2 (e), "The Board of Trade, with the concurrence of the Treasury, may from time to time appoint a person to collect and get in all such unclaimed or undistributed funds or dividends, and for the purposes of this section any Court having jurisdiction in bankruptcy shall have, and at the instance of the person so appointed or of the Board of Trade may exercise, all the powers conferred by this Act with respect to the discovery and realisation of the property of a debtor, and the provisions of Part I. of this Act with respect thereto shall, with any necessary modifications, apply to proceedings under this section." Under these sections I am not sure that I could not at once apply for an order of committal; but I have thought it better not to adopt this course, but simply to ask for an order directing that these moneys should be paid over. It is clear that *Dubois* and *Brett* are only trifling with the Court.

Swinfen Eady:

Not only are the statements which have been put forward as facts by the Board of Trade not facts, but they are the reverse of truth. I can prove beyond dispute that the so-called facts, and those moreover on which the success of this motion depends, are

wholly false. It is altogether untrue that no remuneration was voted to the trustees until December last. In May, 1879, a resolution was passed by the Committee of Inspection giving the sum of 75*l.* to each trustee as remuneration, and 50*l.* was paid on account. The resolution passed in December, 1883, was merely a duplicate of that of May, 1879, the previous one having been unfortunately lost. [In support of these statements counsel read affidavits of *Dubois* and *Brett* to the above effect, and also referred to certain entries in the diary of *Brett* with reference to the liquidation proceedings.] The remuneration was voted long before there was any change in the law. There is no ground for the suggestion which has been made that the whole business was hastily gone through at the last moment in the vain endeavour to escape the consequences of the new Act. The committee of inspection are the proper judges of what the remuneration should be, and section 162 certainly was not intended to compel trustees to refund money which had been properly granted to them in pursuance of a resolution of the committee of inspection.

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Sir F. Herschell in reply :

No suggestion has been made that any vote giving remuneration was passed in the year 1879 until now. If such is the case, why was not that fact communicated to the Board of Trade when they first applied for an explanation? Again, if there was a resolution passed in 1879, why was it not filed? There is no trace of it amongst the other documents of the proceedings.

[Counsel for the trustees, being desirous to have an adjournment in order that they might obtain further evidence, and the trustees not being present for cross-examination by the Solicitor-General, the case was adjourned for a week for this purpose; the trustees being ordered to pay the costs of the adjournment.]

April 7th.

Sir Farrer Herschell (Solicitor-General) :

Last week it was stated that in May, 1879, a resolution was passed by the committee of inspection giving to the trustees, *Dubois* and *Brett*, the sum of 150*l.* for remuneration. A copy of the

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 IN RE JAMES
 PEARCE,
 EX PARTE THE
 BOARD OF
 TRADE.

original resolution has now been put in. I find, however, that it purports to be signed only by *Albert West*, one of the committee of inspection. I wish to cross-examine *Mr. Brett*.

[In cross-examination *Brett* said :—I have not now any account of my claim for remuneration against the estate, one of my clerks made out the claim, but it has unfortunately been lost. The property of the debtor was sold under the instructions of my co-trustee, *Mr. Dubois*. I consented to the sale. I also attended to certain administrative work. Practically until 1879 I did very little. I received a cheque for 50*l.* in May, 1879, because I thought I might as well have the use of the money like any other trustee.]

Sir Farrer Herschell :

There is at present no evidence whatever of the meeting of the committee of inspection which is alleged to have been held in 1879. The only evidence put forward is a document which purports to be signed by one of the committee.

Swinfen Eady :

I do not know that it is absolutely necessary that such a resolution should be in writing. If such a resolution was passed, it clearly is immaterial that it was only signed by one inspector.

[CAVE, J.: An affidavit might easily have been made by the members of the committee of inspection saying that such a resolution was passed in 1879. There is none.]

I submit that the document signed by *West*, and the entries in *Brett's* diary, show clearly that in May, 1879, 75*l.* each was voted to the trustees. I submit that this conclusively disposes of the story put forward by the Board of Trade, that the trustees kept the property until 1883, and then, in the hope of evading the provisions of the new Act, a resolution granting the remuneration was hastily passed. Whatever was done, was done in 1879. It was not an afterthought in the year 1883.

CAVE, J. :

Judgment.

I am of opinion that the order asked for must be granted. This is a most scandalous case. The total assets of the debtor's estate

amounted to 199%, which was realized in 1877. Mr. Brett has been examined, and cannot make out that he has done anything which would occupy at most more than a few hours of his time. In fact he seems to have done almost nothing; and yet it is alleged that the committee of inspection, who ought to fix the remuneration, met and agreed that 150%, nearly the whole of the available assets, should be divided between the trustees. In my opinion, *if* the committee of inspection passed any such resolution, they grossly abused their office. But I do not believe that the committee of inspection did anything of the kind. No affidavit by the members of the committee of inspection has been made, and they have not been called. The evidence for the trustees is in fact that *Dubois* knows nothing; he was not present at the meeting, but was informed by his co-trustee that the resolution had been passed. *Brett* says that a claim was made upon the estate, and that the committee of inspection allowed 75% each, and that the resolution was signed, he believed, by the committee of inspection. He was not present at the meeting of the committee. The resolution, when produced, is signed by one member of the committee only. There is no entry of the claim in the accounts; there is no entry whatever in 1879; but in 1883 there is a statement that the accounts are completed. Nothing is then said about any resolution in 1879. I do not believe that there was a meeting in 1879, or a resolution passed. The trustees have had the money in their pockets, and they must pay the money into the bank.

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Sir Farrer Herschell :

Under the circumstances of the case, I feel bound to ask for costs.

CAVE, J. :

I think certainly the respondents must pay the costs.

Swinfen Eady :

I ask your lordship for time to comply with the order.

CAVE, J. :

You may have fourteen days.

Solicitor: *W. W. Aldridge*, the official solicitor.

BEFORE MR.
JUSTICE CAVE.

1884.

March 31.

IN RE LANDROCK, Ex PARTE FABIAN.

Bankruptcy Act, 1883, Section 44 (1).

Held.—That where goods had been sold to a debtor, and there was no evidence to show that such goods were sold as to sample, the mere fact that a letter is subsequently written by the vendee to the vendor stating that he could not accept the goods, but would hold them for the vendor and try to sell them for him (and to which letter no answer is returned by the vendor) will not constitute the vendee a trustee for the vendor under section 44 (1) of the Bankruptcy Act, 1883, so as to prevent the trustee in the bankruptcy claiming such goods as part of the estate in the event of the vendee subsequently becoming a bankrupt.

THIS was an application on behalf of one *Fabian*, for an order declaring that fifty pieces of cloth, alleged to be part of the estate of the bankrupt, *C. G. Landrock*, and claimed as such by the trustee in the bankruptcy, were the property of the applicant.

The facts of the case were as follows:—

In the month of November, 1883, *Zingler*, a traveller employed by the bankrupt, *Landrock*, saw *Fabian* at Berlin, and gave an order for the goods in question to be supplied to the bankrupt.

The goods were sent from Berlin, and received in London by *Landrock* on November 28th, and were deposited by his order at the warehouse of Messrs. *Swan & Co.*, in whose custody they had since remained.

On December 6th a letter was written to *Fabian* by *Landrock*, stating that he had examined the goods, and he refused to accept them on the ground that they did not come up to sample, but that he would hold them to the use of *Fabian*, and would try to sell them for him.

To that letter no answer was sent.

On January 10th, 1884, a petition was filed against *Landrock*, and, at the subsequent meeting of creditors, *J. F. Lovering* was appointed trustee of the bankrupt's estate.

The trustee now claimed the goods in question, and against this claim *Fabian* appealed.

Lee Roberts for *Fabian*.

I submit that *Landrock* did not intend to accept these goods, and in fact never took them, and that they do not in consequence form part of his estate. The letter written by *Landrock* on December 6th is clear upon that point. He intended to hold the goods only for *Mr. Fabian*. Section 44 of the Bankruptcy Act, 1883, which describes the property of a bankrupt which shall be divisible amongst his creditors, especially excepts "(1) Property held by the bankrupt on trust for any other person." These goods which are now claimed by the trustee would come under this exception. In the books of the bankrupt there is no entry or reference to this transaction. *Fabian* has never been spoken of as a creditor, and is not so entered in the bankrupt's books. [An affidavit of *Fabian* was read in support.]

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[CAVE, J.: It appears to me, even from *Fabian's* affidavit, that there was a sale out and out. There was an actual sale to *Zingler*. Suppose you came here to compel the bankrupt to keep the goods, he would have no answer. You do not make out what the terms of the purchase were: you do not show that the goods were sold as to sample; so far as I can see you do show that it was a sale out and out.]

I submit that it is clear *Landrock* held them on our account by his letter of December 6th, in which he says he will hold them for us and on our account.

[CAVE, J.: The vendor never assented to that. There is no evidence that the goods were sold by sample. There was an actual transfer of the goods. The bankrupt could not dissolve the contract by himself.]

The letter constituted *Landrock* an agent for *Fabian*. But I further submit the *transitus* was not ended.

[CAVE, J.: The goods did get to *Landrock*, and he directed them to be taken to another place. There was no stoppage *in transitu*.]

Further, on January 7th, *Fabian* gave notice to Messrs. *Swan & Co.* not to part with the goods. The trustee was not appointed until January 23rd. The bankruptcy petition itself was not filed

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until January 10th. I submit that *Fabian* exercised his right before the right of the trustee accrued.

Vernon Smith, for the trustee, was not called on.

CAVE, J. :

Judgment.

I am of opinion that this application must be refused. It has been argued that there was not a complete sale, and that the *transitus* was not ended. Now the sale took place in November, 1883, when *Zingler* called and bought the goods, and it was a sale of specific goods without terms. The goods were duly sent off from Berlin, and arrived in London, and *Landrock* gave directions that they were to be taken to the warehouse of Messrs. *Swan & Co.* Here there was an actual sale and delivery of specific goods, and the right of stoppage *in transitu* immediately ended when the goods were delivered up by the carriers at the place where the vendee directed. But it has been further argued, that on December 6th *Landrock* wrote to the vendor and said that he could not accept the goods, as they did not come up to sample, but that he would hold them to the use of the vendor, and would try to sell them for him ; and it is urged that this letter constituted *Landrock* a trustee for *Fabian*. But there is no evidence that these goods were sold by sample, if so, there is no evidence that the sale was of such a kind as to justify *Landrock* returning them. *Fabian's* affidavit shows that there was a sale out and out of the fifty pieces of cloth. It is true that, if on receipt of the letter of December 6th *Fabian* had assented to the doing away with the sale, then—apart from any question of fraudulent preference—the sale might have been put an end to. But he did not do so. *Landrock* had no right to put an end to the sale by himself. If the letter of December 6th was an offer, it was never accepted. The notice given by *Fabian* to Messrs. *Swan & Co.* to hold the goods, is not sufficient. I am, therefore, of opinion that there was a complete sale of the goods, and that *Landrock* could not repudiate it—that the *transitus* was at an end—and that there was no consent of the parties to do away with the sale before the bankruptcy. The motion must be refused with costs.

IN RE W. H. WILKINSON, EX PARTE THE OFFICIAL
RECEIVER.

BEFORE
MR. JUSTICE
CAVE.
1884.
April 22.

*Bankruptcy Act, 1883, Sections 27 and 48—Examination of Witnesses—
Fraudulent Preference—Costs of Official Receiver.*

The debtor, who carried on business at two different premises, within a few days of filing his petition, executed an assignment, handing over his interest in the lease, good-will and stock of one of the said premises to a judgment creditor who was threatening to levy execution, such assignment to be in full satisfaction of the whole judgment debt, and the judgment creditor was to redeem the lease of the property which had been deposited on mortgage with a loan society and to pay rent due, &c.

Held.—That there was no proof that the motive of the debtor was to prefer the creditor; that at the time of the assignment the judgment creditor could seize and have his debt paid out of the goods at both the places of business of the debtor; that the effect of the assignment was to relieve the debtor of liability at one place of business and could not be deemed to be a fraudulent preference.

THIS was a motion on behalf of the official receiver for an order declaring that a certain assignment bearing date December 15th, 1883, and made in favour of *G. B. Wilkinson* (a brother of the bankrupt, *W. H. Wilkinson*), was fraudulent and void; and that the property mentioned in the assignment be declared to be the property of the official receiver; and further that *G. B. Wilkinson* be ordered to render an account of the rents and profits of the business stated to have been assigned.

The debtor, *W. H. Wilkinson*, had for some time carried on business as a hatter in two shops, one situate in Upper Street, Islington, and the other in Liverpool Street. Both these premises were leasehold; but the leases had been deposited on mortgage with the Cripplegate Loan Society, from whom the debtor had borrowed money.

In order to carry on his business the debtor had also at different times obtained several large sums on loan from his brother, *G. B. Wilkinson*; and on June 23rd last, *G. B. Wilkinson* issued

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a writ for 250*l.* money lent. The action was not defended, and judgment was obtained. Nothing was done on the judgment, however, until December 3rd, 1883, on which date a letter was written by *G. B. Wilkinson* to the debtor, *W. H. Wilkinson*, threatening that if payment was not made, execution would be levied. Some correspondence took place, and a letter was finally sent to the debtor by his brother, offering to redeem the Liverpool Street property, if an assignment of the premises and stock there were made to him; and stating that he would take such assignment in satisfaction for his whole debt.

This assignment was accordingly made on December 15th, 1883.

On January 5th, 1884, the debtor, *W. H. Wilkinson*, filed his petition; and application was now made by the official receiver that the above assignment might be set aside.

Bigham, Q.C. (*M. C. Chalmers* with him), for the official receiver, after stating the above facts, said:—

I now propose to examine both the debtor and his brother under section 27 of the Bankruptcy Act, 1883.

Cooper Willis, Q.C. (*Oswald* with him), for the respondent:

Then I object. I have no objection to the witnesses being examined in the ordinary way, but they cannot be examined under section 27. Section 27 of the new Act is equivalent to section 96 of the Act of 1869, and is practically the same as section 115 of the Companies Act. The examination under section 27 has already been held before the registrar; it is a private examination in order to satisfy the trustee.

Bigham, Q.C.:

An *ex parte* application was made in this case for leave to summon witnesses under section 27 for examination. The object was to put the debtor and his brother in the box, and to conduct the case, if necessary, as if they were hostile witnesses. Under the old Act, when a deed was impeached the practice was to treat the debtor as a hostile witness.

Cooper Willis, Q.C.:

I never heard of such a thing.

CAVE, J. :

I see no objection to the debtor and his brother being examined. They are here for that purpose. I do not take much notice of the question whether the witness is to be treated as a hostile witness or not ; but counsel for the official receiver will have to confine himself to the matter in question. He must not put leading questions. If I think a question is a leading question I shall not allow it. The examination must be for a specific purpose.

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Cooper Willis, Q.C. :

If the questions are asked under your Lordship's discretion I do not object to the examination for one moment. Section 27 was what I objected to. There was a case under section 96 of the Act of 1869—that of *Ex parte Willey, In re Wright*, L. R., 23 Ch. Div. 118 ; 52 L. J., Ch. 546 ; 48 L. T. 79, 380—in which the Master of the Rolls said : “ The 96th section is perfectly plain . . . the Court may, on the trustees' application, summon certain persons to give discovery. It is a power not to summon a man as a witness, but to summon him for the purpose of discovery, and he is treated in a totally different way from a witness. You cannot ask a witness the questions you can ask a man summoned under the 96th section.” As I understand, the witnesses will now be called simply as if they had been subpoenaed.

[The debtor, *W. H. Wilkinson*, was examined, and said : “ My brother applied frequently for repayment of the money he had lent me. The money I had from him was to help me out of my difficulties. I do not think my brother made any written application for payment until December, 1883. My liabilities at the end of November were about 700*l.* or 1,000*l.* My assets, including the assignment, would be about 300*l.* (By *Cooper Willis, Q.C.*) The letters from my brother came by post. Several creditors were pressing me in December. (By the *Judge.*) Loog & Co. were pressing me. They wanted the leases. I said they were mortgaged. They were mortgaged at the beginning of the year 1883. They were merely deposited with the Cripplegate Loan Society.]

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[*G. B. Wilkinson*, said :

I knew my brother was in difficulties some years ago. I am almost sure I wrote to my brother for the amount of the judgment debt before December, 1883. I wrote the letter of December 3rd, in which I threatened execution, because I had not been repaid 40*l.* which I had lent subsequent to the judgment, and which my brother had promised to repay in a fortnight. The assignment of the lease of the premises in Liverpool Street passed by an actual deed; the stock in trade by a subsidiary document of the same date. I took the assignment in satisfaction for my whole debt. After taking it I paid 102*l.* 10*s.* Part of that was in redeeming the mortgage; part went for rent, gas, &c., without rates and taxes.]

Bigham, Q.C. :

I submit that sufficient has been proved to satisfy your Lordship that there has at any rate been a fraudulent preference. Look at section 48 of the Bankruptcy Act, 1883. That section says : "Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy." The circumstances of the present case come within this. The only point is whether the transaction was entered into *with a view* of giving the brother a preference. It cannot be doubted that it had that effect. It was entered into on the eve of bankruptcy, and with a person who knew what the position of the debtor was; there had been interviews between the parties, and discussions had taken place with regard to the debtor's position. The letters written before the transfer will doubtless be relied upon to show that the debtor was led to make the assign-

ment through fear of his brother taking action under the judgment. I submit it was part of a scheme they agreed to carry out, and that the transaction was entered into with the view of giving a fraudulent preference. Before 1869, it was decided that it was sufficient if the debtor intended to prefer. After that year it was decided in *Butcher v. Stead*, L. R., 7 H. L. Cas. 839; 44 L. J., Bank. 129; 33 L. T. 541, that the creditor must know he was being preferred. Now, by section 48 of the new Act, an important change is made in the law. "The corresponding words in section 92 of the Bankruptcy Act, 1869, were, 'but this section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration,' and it was held (Lord Selborne dissenting), in *Butcher v. Stead*, that this protected any creditor who was ignorant that he was being preferred. . . . The object of the present sub-section is to avoid the transaction as between the debtor and the creditor, but to save it as regards a third person taking in good faith or for valuable consideration." (See *Chalmers*, p. 96.) All we have to consider is, whether the debtor intended to prefer his brother.

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[CAVE, J.: The difficulty for you is that at the time of the assignment the debtor was subject to a judgment both at Liverpool Street and Upper Street, and he, by the assignment, gets rid of the liability of the property in Upper Street, and satisfies the judgment with a less amount. My difficulty is to see what the creditor got.]

He got the lease.

[CAVE, J.: That was worth almost nothing. The creditor paid off the mortgage and other sums to the amount of 102*l.* 10*s.*]

He got the stock; but I cannot say the value of it.

[CAVE, J.: I cannot see what preference the brother has got. What the brother did was, as a matter of fact, to give up one property. He could have become a creditor by elegit, and so have got the whole. He satisfied himself with part.]

I cannot take the case farther.

M. C. Chalmers followed.

Cooper Willis, Q.C. (*Oswald* with him), were not called upon.

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CAVE, J.:

IN RE W. H.
WILKINSON,
EX PARTE
THE OFFICIAL
RECEIVER.
Judgment.

I am of opinion that the case has not been made out. I must be satisfied that the substantial motive of the debtor was to prefer the creditor. That has clearly not been made out on the facts. The debtor had been for some time in difficulties, and had borrowed various sums from his brother, and in June, 1883, between 200% and 300% was due to the brother. An action was commenced, and judgment obtained. It is not suggested that that was a fraudulent preference; the brother simply turned his debt into a judgment. The debtor continued to be still pressed, and again went to his brother, and he, considering that the debtor might still pull through, lent him more money. But on December 3rd the debtor had not paid a certain 40% of this money which had been lent subsequent to the judgment, and which the debtor had promised to pay within a fortnight. The brother thereupon wrote the letter which has been produced, in which he threatened execution, and after some correspondence an agreement is come to for the assignment of the Liverpool Street property, the brother agreeing to take that assignment in satisfaction of the whole debt. I do not think that the letters were written in view of the subsequent bankruptcy of the debtor. At this time it must be borne in mind the brother could seize, if he so wished, both at Upper Street and Liverpool Street; he could at that time, by a writ of elegit, have acquired the right to have the debt paid out of the goods at both places. What was done was this: The brother agreed that the judgment debt should be absolutely satisfied by the transfer of the Liverpool Street property; he further agreeing to redeem the mortgage upon it, and pay the rent, &c.; and he actually paid 102% 10s. for that purpose. He thereby relieves the debtor from all fear of having the Upper Street property seized. In the face of this, I am asked to say that this was done with a view of giving a fraudulent preference. I cannot see this. The debtor was relieved by it. I cannot see that it gave the creditor any benefit. The conclusion I have arrived at is, that there has been a total failure to make out that the debtor's motive was at all to prefer his brother. I think by the arrangement he hoped to be able to carry on his business. I think what he did was with the view of protecting his property in Upper Street; and the motion must therefore fail.

Cooper Willis, Q.C.:

I ask for costs, and that, under the circumstances, the costs should be borne by the official receiver. The application has been made by the official receiver in his capacity as trustee, and not as an officer of the Court. In such a case there is no reason why the official receiver should stand in a better position than an ordinary litigant.

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IN RE W. H.
WILKINSON,
EX PARTE
THE OFFICIAL
RECEIVER.

Counsel referred to *Ex parte Angerstein, In re Angerstein*, L. R., 9 Ch. App. 479; 30 L. T. 446.

CAVE, J.:

I think I shall allow costs out of the estate.

Cooper Willis, Q.C.:

Then I ask that our costs may be allowed in priority to those of the official receiver. In any other event the estate might be eaten up and nothing be left to pay the costs of a respondent who successfully resists an expensive application.

CAVE, J.:

The official receiver is entitled to take the opinion of the Court in certain matters, and I do not think he ought to be made personally liable for costs. I will go so far. I will give the respondent his costs out of the estate in priority to any subsequent costs.

Solicitors: *W. W. Aldridge* for the official receiver.

Freeman & Winthrop for the respondent.

CASES relied upon or referred to:—

Ex parte Willey, In re Wright, L. R., 23 Ch. Div. 118; 52 L. J., Ch. 546; 48 L. T. 79, 380.

Butcher v. Stead, L. R., 7 H. L. Cas. 839; 44 L. J., Bank. 129; 33 L. T. 541.

Ex parte Angerstein, In re Angerstein, L. R., 9 Ch. App. 479; 30 L. T. 446.

BEFORE
MR. JUSTICE
CAYE.
1884.
April 22.

IN RE ZAPPERT & CO., EX PARTE THE TRUSTEE.

Bankruptcy Act, 1883, Section 55—Disclaimer.

Held.—That where application for leave to disclaim is made by a trustee in a bankruptcy, a demand of the landlord for rent in respect of the premises sought to be disclaimed will not be entertained by the Court unless such landlord has been kept out of his property for the benefit of the creditors and the creditors have obtained some advantage therefrom.

THIS was the first case in which application was made to the Court by a trustee in bankruptcy for leave to disclaim under section 55 of the Bankruptcy Act, 1883.

It was an application on behalf of the trustee in the bankruptcy of *Zappert* for leave to disclaim (1) a lease made in 1882 of a shop in High Street, Camden Town, for a term of twenty-one years; (2) an agreement between one *Hamill* and the bankrupt for the tenancy of certain rooms in the City at a yearly rental of 200*l.*; (3) certain premises held from one *Humphreyson* at a yearly rental of 48*l.*

With regard to the first two properties an arrangement had been come to by which the premises were to be given up on payment of the rent up to Lady-day last.

Between the filing of the petition and the first meeting of the creditors, the bankrupt has absconded.

Brough for the trustee :

The trustee has never taken possession of the premises held of *Humphreyson*, and objects to any payment of rent. He asks leave to disclaim.

Kisch for the landlord :

I submit that leave to disclaim should be given only on condition of rent being paid. By section 55 (3), the power is given to the Court, on granting leave, to impose such terms as it may see fit. The March rent for these premises was due and has not been paid. As another quarter has commenced, I might perhaps ask for rent up to Midsummer. I do not do that, but I submit that it ought to be paid as up to March.

[CAVE, J.: Why?]

The trustee might have disclaimed earlier.

[CAVE, J.: You gave him no notice.]

1884.

IN RE ZAPPERT
& CO.,
EX PARTE
THE TRUSTEE.

I would refer to *Titterton v. Cooper*, L. R., 9 Q. B. 473. In that case, at page 484, Lord Coleridge said: "The trustee may acquire under the Bankruptcy Act, 1869, a lease burdened with onerous covenants: the property therein must surely vest in him forthwith; he may disclaim the lease, but this privilege also implies that until disclaimer it belongs to him."

[CAVE, J.: In that case there had been no disclaimer. In this case you have stood still and done nothing. Why should you be paid your rent in full in preference to other creditors?]

[Counsel also referred to *Ex parte Arnal*, *In re Witton*, L. R., 24 Ch. Div. 30; 49 L. T. 221; *Ex parte Isherwood*, *In re Knight*, L. R., 22 Ch. Div. 384; 52 L. J., Ch. 370; 48 L. T. 398; *Ex parte Izard*, *In re Bushell*, L. R., 23 Ch. Div. 115; 48 L. T. 502.]

CAVE, J.: In this case I see no reason to interfere. The landlord might have had possession at any time he asked for it. If he had been kept out of his property for the benefit of the creditors, he ought to be paid, but I must confess I cannot see that this is so. I cannot see any grounds why the landlord should have any portion of the rent. The creditors have not gained any benefit from the property, and I cannot understand why the landlord should have any right to the detriment of the other creditors. The trustee will have leave to disclaim, with costs.

Solicitors: *Lumley & Lumley* for the trustee.

Allward for the landlord.

CASES relied upon or referred to:—

Titterton v. Cooper, L. R., 9 Q. B. 473.

Ex parte Arnal, *In re Witton*, L. R., 24 Ch. Div. 30; 49 L. T. 221.

Ex parte Isherwood, *In re Knight*, L. R., 22 Ch. Div. 384; 52 L. J., Ch. 370; 48 L. T. 398.

Ex parte Izard, *In re Bushell*, L. R., 23 Ch. Div. 115; 48 L. T. 502.

BEFORE
MR. JUSTICE
CAVE.
1884.
April 22 & 23.

IN RE G. C. KNIGHT, EX PARTE SMITH & CO.

Bankruptcy Act, 1883, Sections 15 and 16, Schedule 1, Rule 14; Schedule 2, Rules 22, 24, 25 and 27—Rejection of Proof by Official Receiver as Chairman of the First Meeting of Creditors—Appeal—Locus Standi of Bankrupt to oppose Appeal.

Held.—That where at the first meeting of the creditors of a bankrupt the chairman rejects the proof tendered by a creditor for the sum at which the bankrupt has entered and sworn to the debt in his statement of affairs, and the creditor appeals from such rejection, the bankrupt has no *locus standi* to appear and oppose the appeal, even though he may have been served with notice of the appeal; but it would seem that the bankrupt will be entitled to his costs of appearing.

THIS was an appeal from the rejection of a proof by the official receiver.

The appellants, Messrs. *Smith & Co.*, were oil merchants in London, and for some years had done considerable business with the debtor, *G. C. Knight*.

The bankruptcy petition was filed on March 6th last, and the first meeting of creditors was held on March 21st.

At this meeting, *Smith & Co.* tendered a proof for 6,662*l.*, for goods bought and sold and money lent, and proposed to vote in respect of that proof. A creditor present, however, objected that the proof appeared to be in respect of an unliquidated sum, and that no amount was ascertained.

The official receiver acted upon this objection, and rejected the proof; and on March 27th notice of the objection was sent to Messrs. *Smith & Co.*

From this decision *Smith & Co.* now appealed.

Bigham, Q.C. (*Sidney Woolf* with him), for Messrs. *Smith & Co.*, set out in detail the circumstances under which the debt in question arose, and contended that the transactions, in consequence of which the debt was incurred, were perfectly *bonâ fide*,

and that the claim in respect of which the creditors had put in their proof was an ascertained sum.

The creditors were then called and examined in support of the statements made.

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G. C. KNIGHT,
EX PARTE
SMITH & Co.

R. T. Reid, Q.C., who appeared for the debtor, wished to cross-examine.

Bigham, Q.C. :

I strongly object. This is an appeal from a decision of the official receiver. *Mr. Linklater* appears for the official receiver. *Mr. Reid* appears for the debtor. He has no right to cross-examine. He has no *locus standi*. This was the debtor's own petition. As soon as it was presented the official receiver became entitled to the property. The first meeting of the creditors was held as required by section 15 of the Bankruptcy Act, 1883, and the debtor produced his statement of affairs made out in accordance with section 16. In it the debtor swears that this debt is due to Messrs. *Smith & Co.* The official receiver was present as chairman at the first meeting, and by Rule 14 of Schedule 1 of the Act, "The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court." The official receiver has given his decision, and from that decision we appeal. The only person entitled to appear and oppose is the official receiver, and he only has *locus standi*. Rule 22 of Schedule 2 of the Act provides, that "the trustee shall examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection." And by Rule 24 of the same Schedule 2, "If a creditor is dissatisfied with the decision of the trustee in respect of a proof, the Court may, on the application of the creditor, reverse or vary the decision." While, by Rule 25, Schedule 2, "The Court may also expunge or reduce a proof upon the application of a creditor if the trustee declines to interfere in the matter, or in the case of a composition or scheme upon the application of the debtor." In this case there is no composition or scheme; the

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 IN RE
 G. C. KNIGHT,
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debtor is not interested; the person interested is the official receiver, who represents the creditors, and he alone is to be heard. No trustee has been appointed, but by Rule 27, Schedule 2, "The official receiver, before the appointment of a trustee, shall have all the powers of a trustee with respect to the examination, admission and rejection of proofs, and any act or decision of his in relation thereto shall be subject to the like appeal." I submit that a trustee or a creditor, if the trustee will not interfere, is entitled to be heard; but a debtor, except in the case of a composition or scheme, is clearly not entitled.

[CAVE, J. : The debtor has been served with notice of motion. Why was this done?]

Ex majore cautela. It was the proper thing.

[CAVE, J. : You do not propose surely to bring him here to say nothing. You serve him with notice, and then say he shall not open his mouth.]

The debtor may make what statement he likes, but I object to his cross-examining. The official receiver is entitled to cross-examine; that is indifferent to me, but I object to the debtor's doing so.

CAVE, J. :

The objection has been taken. If it is a good one, I certainly think that the debtor is entitled to his costs of being brought here.

R. T. Reid, Q.C. :

On payment of his costs, the debtor will withdraw.

J. Linklater for the official receiver.

In that case I shall ask to stand on my strict rights. The notice of rejection given by the official receiver asked for further evidence. That has not been given, but this appeal has been launched. I am not instructed fully for the purpose of cross-examination, and I ask that the case may be adjourned.

Case adjourned.

Solicitors : *Houghtons & Byfield* for Messrs. *Smith & Co.*

Hollams, Son & Coward for the debtor.

W. W. Aldridge the official solicitor.

IN RE WHITE & CO., EX PARTE THE OFFICIAL
RECEIVER.

BEFORE
MR. JUSTICE
CAVE.
1884.
April 23.

*Bankruptcy Act, 1883, Section 102, Sub-section 4; and Sections 9 and 10 (2);
Bankruptcy Rules, 1883, No. 259—Application for Transfer of Action
pending in the Chancery Division—Assignment of Debtor's Property—Book
Debts.*

Held :—(1) That when application is made under section 102, sub-section 4, of the Bankruptcy Act, 1883, for the transfer of an action pending in another Division of the High Court, some proof must be afforded that advantage is likely to be derived by reason of such transfer to the judge in Bankruptcy.

(2) That an assignment of the book debts will carry the books, so that the person entitled to the book debts under the deed is entitled to the books of account; and that Rule 259 of the Bankruptcy Rules, 1883, was intended to apply only to a case where a person not entitled to the debts sets up some claim to the books.

Quere.—Whether in a case where a receiving order has been made, but the debtor has not been adjudicated a bankrupt, the Court has any jurisdiction under section 102, sub-section 4, of the Bankruptcy Act, 1883, to make an order to transfer.

THIS was an application on behalf of the official receiver (1) that an action pending against the debtor in the Chancery Division of the High Court of Justice, and brought by one *A. O. Bayly*, as mortgagee of the personalty of the debtor, might be transferred to this Court, and that proceedings in that action might be stayed; (2) that the mortgagee might be directed to give up the debtor's books, &c.; (3) that the plaintiff in that action, *A. O. Bayly*, might be restrained from dealing with the property of the debtor.

The action in the Chancery Division was commenced on May 19th, 1883, and by his statement of claim the plaintiff claimed the principal and interest due to him under a certain indenture bearing date August 21st, 1880, and in default of payment, that there might be foreclosure, and that a receiver be appointed. The debt owing was for money advanced, and the action was defended by the debtor.

A receiving order was made against the debtor on March 16th, 1884; but the debtor had not been adjudicated a bankrupt.

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M. C. Chalmers for the official receiver.

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The application to transfer is made under section 102, sub-section 4 of the Bankruptcy Act, 1883. It can be made at any time after a receiving order has been made. It might be made *ex parte*, but it has been thought better to give notice to the other side, and that has been done.

[CAVE, J.: With regard to that point, I may say that I doubt very much whether the order should be made *ex parte*. I do not think a judge should make such an order without hearing both sides. However, the question does not arise in the present case.]

[Affidavits of *White & Co.* were read in support of the application.]

I submit that the facts shown in the affidavits I have read conclusively show that the action in the Chancery Division is bound up with the bankruptcy proceedings. There is a counterclaim of the defendant. It is most desirable that the action be transferred. In liquidation proceedings of a company it is almost as a matter of course that an action should be transferred to the judge having charge of the liquidation proceedings. Again, in this case the plaintiff has seized under the mortgage deed, and it is most important that he should be restrained from dealing with the property. Until adjudication the official receiver is bound to preserve the property. As to the question that the plaintiff be directed to give up the books of the debtor, Rule 259 of the Bankruptcy Rules, 1883, is explicit; it is there provided that "no person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of accounts belonging to the debtor or to set up any lien thereon." The offer of the mortgagee is that he should have the books, and that the official receiver shall have access to them. I ask that the terms of that offer may be reversed, and that the official receiver should have the books, and that the mortgagee shall have access to them.

Winslow, Q.C. (*Frank Evans* with him), for the mortgagee:

With regard to the question of transfer, I submit that it is the first duty of those persons who make an application of this kind

to show that some advantage would be derived from it. Here there is no suggestion that there would be any advantage from the transfer. The facts tend to show the opposite. The case has been several times before Mr. Justice *Pearson*, and he is thoroughly cognizant of all the facts. Further, I submit that your Lordship has no jurisdiction in this case to make an order. Section 102, sub-section 4 of the Bankruptcy Act, 1883, provides that "Where a receiving order has been made in the High Court under this Act, the judge by whom such order was made shall have power, if he sees fit, without any further consent, to order the transfer to such judge of any action pending in any other division, brought or continued by or against the bankrupt." In this case there is no bankrupt. There is only a receiving order. The words of the section were put in on purpose to avoid the case of an application of this kind being made and no bankruptcy following. The word "bankrupt" was intended to have effect, and it was intended that the Court should have no jurisdiction to transfer until there was a bankrupt. Looking at the whole scope of the Act, it would be a most inconvenient practice to transfer actions to this Court until there has been an adjudication, and it was never so intended. Then, again, the official receiver, in order to become entitled to have *Bayly* restrained must show there is some good defence to the action. What right has the official receiver? In the case of *Ex parte Bayly*, *In re Hart*, L. R., 15 Ch. Div. 223, it was clearly decided that "where at the time of the filing of a liquidation petition the grantee of a bill of sale given by the debtor is in actual uncontrolled possession of the property comprised in the deed, the Court ought not to interfere by injunction with the exercise of the grantee's legal rights upon the mere suggestion that if an injunction is granted, it is possible that the trustee in the liquidation, when appointed, may be able to raise a case for impeaching the validity of the deed. In order to justify such an interference the applicant for the injunction must at least swear to his belief of some facts which, if established, would render the deed invalid as against the trustee in the liquidation." Under the new Act the restraining sections are sections 9 and 10 (2), and the principles laid down in *Ex parte Bayly*, *In re Hart*, would apply in the present case. There is nothing in the

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affidavits which have been read to show that the Court should interfere. All that appears is that Mr. *Aldridge*, the official solicitor, says, "He believes that there is a good defence, in that the deed is a bill of sale and has not been registered." There is nothing whatever to induce the Court to grant this part of the application. When the bankruptcy petition was filed on February 23rd the receivers of the High Court were in possession. In *Ex parte Saffery, In re Brenner*, L. R., 16 Ch. Div. 668 ; 44 L. T. 324—that was a case of a sheriff's officer, but the same as receiver, and it decided that "if the goods comprised in an unregistered bill of sale are at the time of the filing of the bankruptcy petition against the grantor in the actual visible possession of the sheriff under an execution issued either by the grantee or by a third person, they are not, even though the grantee has himself taken no possession, in the apparent possession of the grantor, and the Bills of Sale Act does not apply." And now with regard to the question of the books. Rule 259 has been quoted ; but an entirely wrong construction has been put upon it. The meaning of the rule is, the books which are the property of the debtor. Here, in the present case, there was a provision in the mortgage assigning the book debts—assigning all that is used in the property, and I submit strongly that the assignment of the book debts would carry the books. (*Ex parte Good, In re West*, L. R., 21 Ch. Div. 868 ; 51 L. J., Ch. 831 ; 46 L. T. 823.)

Frank Evans followed.

M. C. Chalmers in reply.

[CAVE, J. : I must say I think you are premature in moving this. It seems to me that the action should not be transferred. Then, as to restraining, I cannot do it in the face of section 9 (2), and certainly ought not to do it without the official receiver giving an undertaking for damages. You ask me to do what section 9 (2) says I am not to do. Section 10 does not give me any power ; that only says the Court may stay "legal process;" this is not. Turning then to section 102 (4), there has been no bankruptcy. I cannot recognize a claim to have the property declared *in statu quo* as you wish.]

The official receiver must take what steps he can to get the property.

[CAVE, J.: The official receiver, like everybody else, must confine himself to taking legal steps.]

Then the books of account are not mentioned in the deed.

[CAVE, J.: No, but the book debts are.]

The books are necessary to the official receiver.

[CAVE, J.: He can have access. It seems to me the person entitled to the book debts is entitled to the books of account.]

CAVE, J.:

I am of opinion that this application must be refused. First, Judgment. with regard to the application for transfer. Certainly the judge is empowered to make such an order if he sees fit. But something in the nature of a claim must be set up by the official receiver in order to induce the Court to exercise this power, and that is wholly wanting in the present case. I am clearly of opinion that I ought not to make the order, and that, without considering the objection which has been raised, that in the present case there has been no adjudication, and therefore that this Court has no jurisdiction. That is a most important question. I do not now decide it; but it is not unlikely that it may hereafter arise, and cause difficulty in another case. Then, as to the restraining order asked for, there is nothing in the Act which gives me power to do what is asked. Mr. Bayly is a creditor, holding security. Neither sections 9, 10, nor 102, give authority to this Court to interfere. Again, as to the books of account. Rule 259 has been read; but I am of opinion that rule applies to cases where a lien is set up on the books themselves. In the present case it is not upon the books themselves, and, in my opinion, an assignment of the book debts would carry the books. What Rule 259 was intended to guard against, appears to be where a person, not entitled to the debts, sets up some claim to the books, and so interferes with the official receiver. For these reasons, therefore, I am of opinion

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that the motion fails upon all grounds, and must be refused with costs.

Solicitors: *W. W. Aldridge*, the official solicitor.
Coombs, Bayly & Henley for the mortgagee.

CASES relied upon or referred to:—

Ex parte Bayly, In re Hart, L. R., 15 Ch. Div. 223.

Ex parte Saffery, In re Brenner, L. R., 16 Ch. Div. 668; 44 L. T. 324.

Ex parte Good, In re West, L. R., 21 Ch. Div. 868; 51 L. J., Ch. 831; 46 L. T. 823.

BEFORE
MR. JUSTICE
CAVE.
1884.
April 23.

IN RE T. BROOKE, EX PARTE THE TRUSTEE.

Bankruptcy Act, 1883, Section 55—Bankruptcy Rules, 1883, No. 232—Disclaimer.

Held.—That in cases where a trustee in a bankruptcy seeks to disclaim, if subsequent to the adjudication any advantage has been derived from the use of the landlord's property, that is the use of the creditors and not of the debtor, and for this advantage the landlord is entitled to be paid.

THIS was an application on behalf of the trustee in the bankruptcy of *T. Brooke* for leave to disclaim certain premises in Milk Street held by the bankrupt under an agreement bearing date June, 1883, at a yearly rental of 100*l*.

The debtor was adjudicated bankrupt on February 12th, 1884.

The trustee in the bankruptcy was appointed on March 11th, and took possession of the premises from that date until March 25th.

On March 25th the trustee offered possession to the landlord, without prejudice to the landlord's right to rent, or the trustee's right of disclaimer. Possession was refused by the landlord, and

on March 26th the sum of 6*l.* 10*s.* was tendered by the trustee, being the proportionate amount for the time he had held the property, and notice of disclaimer given.

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IN RE
T. BROOKE,
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THE TRUSTEE.

Herbert Reed for the trustee, after stating the facts, said :

The question is simply one between lessor and lessee ; but the lessor has given notice to the trustee requiring the matter to be brought before the Court. (See *Bankruptcy Rules*, 1883, No. 232 (c).)

Little for the landlord :

The landlord does not stand out for a full quarter's rent. But I submit that it would be a fair order if rent should be paid from February 12th. The trustee, it is true, was not appointed until March 11th. But the premises are a warehouse, and the debtor's goods are there. It is only fair that rent should be paid during the time it has been used for the benefit of the creditors. (*Ex parte Ladbury, In re Turner*, L. R., 17 Ch. Div. 532 ; 50 L. J., Ch. 838 ; 45 L. T. 5, referred to.)

CAVE, J. :

I think that these questions ought not to be decided on the Judgment. principle of recouping the landlord for all he has lost. A landlord must suffer as other creditors suffer. But if, subsequent to the adjudication, any advantage has been derived from the use of the landlord's property, that is the use of the creditors, and not of the debtor. If there has been advantage, it is advantage of the creditors, and ought not to be paid for by the landlord. On that principle I decide this, as I shall decide other cases. In my opinion the proper order will be, that the trustee shall disclaim on paying the rent from the date of the adjudication—February 12th—until March 25th, with costs to the landlord.

Solicitors : *Reed & Reed* for the trustee.

J. N. Mason for the landlord.

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CAVE.
1884.

IN RE MACKINTOSH & BEAUCHAMP, Ex PARTE
MACKINTOSH.

April 23.

Bankruptcy Act, 1883, Sections 9 and 10—Action pending in the Chancery Division—Non-payment of Trust Money into Court—Bankruptcy of Trustee—Motion for Writ of Attachment—Jurisdiction of Bankruptcy Court to interfere.

Where application made by a bankrupt, who had failed to pay over certain trust moneys in accordance with an order of the Chancery Division, for an order restraining further proceedings on a motion for attachment,

Held.—That the application must be refused.

If the application had been made by the trustee in the bankruptcy for the benefit of the creditors there might be some grounds for the Court to interfere.

THIS was an application on behalf of *Mackintosh*, one of the bankrupts, for an order restraining further proceedings on a motion for attachment arising out of an action, *Mackintosh v. Chalmers*, in the Chancery Division of the High Court of Justice, before Vice-Chancellor Bacon.

The facts of the case were as follows :—

On December 31st, 1879, the firm of *Chalmers, Mackintosh & Dudgeon*, who had formerly carried on business together as partners in London and China, dissolved partnership. At this time Mrs. *Chalmers* had an account with the firm, which received the dividends of her separate property, and acted as her trustees. Various disputes arose between the late partners, and an action was commenced in the Chancery Division by *Mackintosh* against Mr. and Mrs. *Chalmers*, and was tried before *Bacon, V.-C.* The case against Mr. and Mrs. *Chalmers* failed; but on a counter-claim set up by Mrs. *Chalmers*, an account was ordered to be taken. This was done, and the sum of 1,100*l.* was found to be due to Mrs. *Chalmers*; and on February 22nd an order was made that *Mackintosh* should pay that amount into Court within fourteen days.

By reason of failure to do this, notice was given by Mrs. *Chalmers* that a writ of attachment would be applied for; and this proceeding *Mackintosh*, who had recently presented a bankruptcy petition, now sought to restrain.

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BEAUCHAMP
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Northmore Lawrence (*J. Linklater* with him) for *Mackintosh* :

Section 9 (1) of the Bankruptcy Act, 1883, provides that "on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose." And by section 10 (2), "the Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor; and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just." This was a debt provable in the bankruptcy; and I submit that the words at the end of section 9, "unless with the leave of the Court, &c.," only qualify the words "or shall commence any action or other legal process," and have no connection with those which immediately precede them. It must interfere greatly with the proceedings in the bankruptcy if the debtor is locked up. The debtor has various duties to perform with regard to the discovery and realization of his property, which are defined in section 24 of the Act. It would require a strong law to alter the general rule, and no one has ever attempted to attach a person in a fiduciary position pending the bankruptcy.

[Counsel referred to *Cobham v. Dalton*, L. R., 10 Ch. App. 695; *Lewes v. Barnett*, L. R., 6 Ch. Div. 252; 47 L. J., Ch. 144; *Ex parte Hemming*, *In re Chatterton*, L. R., 13 Ch. Div. 163; 49 L. J., Bank. 17; 41 L. T. 513.]

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[CAVE, J.: You say this was a debt provable in the bankruptcy, and cannot be attachable.]

Hemming, Q.C. (Druce with him), contra:

It is contended that the instant a receiving order is made against the debtor the Act says there can under no circumstances be attachment. The attempt has been made to narrow down the words "unless with the leave of the Court, and on such terms as the Court may impose," and to say that those words only apply to the words "or shall commence any action or other legal proceedings." Now I submit that those words "unless, &c.," also qualify the words "any remedy against the property or person of the debtor in respect of the debt."

[CAVE, J.: Why does the bankrupt come to me? I do not see why this application is made to me.]

I believe it is made under section 10 (2). The bankrupt comes here to prevent us from asking *Bacon*, V.-C., to grant an attachment.

[CAVE, J.: I must ask you, Mr. *Lawrence*, why you come here? You say you are within section 9, and, if so, why do you come to me?]

Northmore Lawrence:

It has always been the practice.

[CAVE, J.: You say they are going to lock the bankrupt up on a debt provable in the bankruptcy. Why should I help you? Under section 9, according to your own reading of it, Vice-Chancellor *Bacon* cannot do it. If he does, the Court of Appeal will soon reverse the decision. You say you are afraid Vice-Chancellor *Bacon* will make an order which he ought not to do. Why should I deal with this case? I do not sit in appeal from Vice-Chancellor *Bacon*. I do not see why I should stop the matter going before the Vice-Chancellor, who knows all the facts. I will leave Mr. *Mackintosh* to Vice-Chancellor *Bacon*. If your construction of section 9 is right, you are absolutely safe. If Mr. *Hemming* is

right, Vice-Chancellor *Bacon* may exercise a discretion, and he knows all the facts.]

1884.
IN RE
MACKINTOSH &
BEAUCHAMP,
EX PARTE
MACKINTOSH.

Northmore Lawrence :

Surely that is contrary to *Cobham v. Dalton*.

[CAVE, J. : That is an authority so far, if the Vice-Chancellor commits your client, you might apply to have him discharged. If section 9 is as you say, you are safe; if not so, why should I interfere?]

Your Lordship's jurisdiction to restrain is admitted.

[CAVE, J. : I may restrain any action, execution, or other legal process; but I must see there is some ground for doing so. I ought not to do it without some ground. For example, if the creditors' property was interfered with, I might interfere to prevent it, but because the debtor happens to have inculpated himself I do not see why I should do so.]

The Act supposes that a bankrupt is to be a free man to help in the administration of his property.

[CAVE, J. : If the Act says so, why do you want my help?]

I submit that when a matter comes into bankruptcy it is for your Lordship to decide all questions.

[CAVE, J. : The trustee claims nothing here; if the trustee did so, I would transfer the action, but no one appears on behalf of the creditors.]

I would submit that when once the bankruptcy commences, it is the duty of the Court to protect the bankrupt.

[CAVE, J. : I am bound to take care of the creditors, not of the debtor. If the trustee came and asked me to transfer the action, I should probably do so; but if a debtor does anything to bring himself under the lash of another Court, I do not see why I should interfere. I do not say there is no power; the question is whether I ought to do it.]

1884.

CAVE, J. :

IN RE
 MACKINTOSH &
 BEAUCHAMP,
 EX PARTE
 MACKINTOSH.
 Judgment.

I am clearly of opinion that this application must be refused. It is contended that under section 9 of the Bankruptcy Act, 1883, the bankrupt cannot be sent to prison. If so, when the motion is brought before Vice-Chancellor *Bacon*, he will deal with it. He is as much bound by section 9 as I am. If this interpretation of section 9 is not correct, I do not see why the bankrupt should not go to prison. Certainly no facts have been brought to my notice which would justify me to interfere. The official receiver does not appear. I shall leave it to Vice-Chancellor *Bacon*, and I am certain if it is contrary to section 9 that learned judge will know how to act; there is certainly no one better qualified by his long experience of the Bankruptcy Act of 1869 to deal with this question. If it is not contrary to section 9, no facts whatever have been brought before me to induce me to interfere, and the application must be dismissed with costs.

Solicitors : *Harwood & Stephenson.*

Laurence, Plews & Baker.

CASES relied upon or referred to :—

Cobham v. Dalton, L. R., 10 Ch. App. 695.

Lewes v. Barnett, L. R., 6 Ch. Div. 252; 47 L. J., Ch. 144.

Ex parte Hemming, In re Chatterton, L. R., 13 Ch. Div. 163;
 49 L. J., Bank. 17; 41 L. T. 513.



PRACTICE.

IN RE COURTENAY, EX PARTE DEAR.

COURT OF
APPEAL.

Bankruptcy Rules, 1883, Nos. 112, 114—Appeal from Decision of Registrar declining to make a Receiving Order—Preliminary Objection—Notice of Appeal served after the lapse of Twenty-one Days.

BEFORE
BAGGALLAY,
L.J.,
COTTON, L.J.,
LINDLEY, L.J.
1884.

THIS was an appeal on behalf of one *Dear* from the decision of the registrar declining to make a receiving order.

April 25.

Cooper Willis, Q.C. (Fillan with him), for the appellant.

Winslow, Q.C. (Lake with him), for Courtenay :

I take a preliminary objection. The appellant is too late. The decision appealed against was given on February 25th. The twenty-one days allowed for appealing terminated on March 17th. It was not brought until March 19th. By Ord. LVIII. of the Rules of the Supreme Court of Judicature, 1883, it is provided “(1) All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.” And “(2) The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party; and in the meantime may postpone or adjourn the hearing of the appeal upon such

1884.
IN RE
COURTENAY,
EX PARTE
DEAR.

terms as may be just, and may give such judgment, and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the Court of Appeal may think fit." In several cases it has been decided that the bringing of an appeal is the service of notice of motion. Subject to certain special rules, also, appeals in bankruptcy matters to the Court of Appeal are regulated by the Rules of the Supreme Court for the time being in force. I go to the Judicature Rules first, therefore, and then show that they are not affected by the Bankruptcy Rules. Rule 112 of the Bankruptcy Rules, 1883, provides, "Subject to the powers of the Court of Appeal to extend the time, under special circumstances, no appeal to the Court of Appeal from any order of the Court shall be brought after the expiration of twenty-one days. The said period shall be calculated from the time at which the order is signed, entered, or otherwise perfected; or, in the case of the refusal of an application, from the date of such refusal." And by Rule 114, "Upon entering an appeal, a copy of the notice of appeal shall forthwith be sent by the appellant to the registrar of the Court appealed from, who shall mark thereon the date when received, and forthwith file the same with the proceedings; and a similar notice shall be delivered by the appellant to each respondent four days before the day on which he intends to move." But this four days was not intended to extend the time for appealing. It does not mean that the twenty-one days may be extended provided four days' notice is given. The decisions under Ord. LVIII. (2) bind this Court, and those decisions are clear, that the bringing an appeal is service of notice of motion.

Cooper Willis, Q.C.:

I must admit that strictly the appellant is out of time; but I ask that, under the special circumstances, the Court will extend the time. Under the old Act, by reason of Sundays intervening, it sometimes happened that twenty-five days were available; this is an early appeal under the new Act, and the solicitors were doubtless under the impression that the rules were the same as the old Act.

[BAGGALLAY, L. J. : Impression is not sufficient.]

Further, the present case was in the paper to come before your Lordships on the 27th of last month, and then stood over by consent. I presume that if the case had then been heard, the same objection would have been taken; and in a case which recently came before him (*In re Speight, Ex parte Brooke*, Weekly Notes, March 22nd), Mr. Justice Cave said that, "When the respondent to an appeal intended to take a preliminary objection, he should give notice to the appellant at the earliest possible moment of his intention so to do, and of the nature of the objection, in order that the appellant might know that if he went on with his appeal he did so at the peril of costs."

1884.
IN RE
COURTENAY,
EX PARTE
DEAR.

BAGGALLAY, L. J.:

I do not think that is the usual practice. In this case there Judgment.
seems to have been some carelessness. The notice bears date March 15th, and there was plenty of time to serve. As it is, the appellant is clearly out of time.

COTTON, L. J., and LINDLEY, L. J., concurred.

PRACTICE.

IN RE J. WILLIAMS.

*Bankruptcy Act, 1883, section 28, sub-section 3(c)—Application for Discharge:
Report of Official Receiver.*

BEFORE
MR. REGIS-
TRAR PEPPYS.
1884.
April 29.

Held.—That the fact that a bankrupt has brought an unsuccessful action, the costs of which he is unable to pay, is not sufficient cause to justify the Court in refusing his discharge on the ground that under sub-section 3(c) of section 28 of the Bankruptcy Act, 1883, such bankrupt has contracted a debt without having any reasonable ground of expectation of being able to pay it.

THIS was an application by the bankrupt, *John Williams*, described as of Pontypool and of York Road, King's Cross, under section 28 of the Bankruptcy Act, 1883, for an order of discharge.

1884.
IN RE
J. WILLIAMS.

W. W. Aldridge, the official solicitor, read the report of the official receiver upon the bankruptcy, and in this the question was raised whether the bankrupt had, by bringing an action against the Pontypool Gas and Water Company, brought himself within the penal provisions of the Bankruptcy Act.

It appeared that the liabilities were 715*l.*, of which 615*l.* were in respect of the law costs of the action.

Under these circumstances it was suggested that as the bankrupt had not the means of paying the costs of an unsuccessful action, he had by embarking in litigation rendered himself liable to have his order of discharge suspended upon the ground of contracting a debt without reasonable expectation of payment. (Bankruptcy Act, 1883, section 28, sub-section 3 (c) .)

PEPYS, REGISTRAR :

Judgment.

It is suggested that the discharge of the bankrupt ought to be suspended on the ground that this action was entered upon by him, the costs of which he had not the means of paying when it proved to be unsuccessful. It is suggested that not being able to pay the costs he was guilty of contracting a debt without reasonable expectation of payment. I cannot come to the same conclusion. Section 28, sub-section 3 (c), of the Bankruptcy Act, 1883, provides that on proof "that the bankrupt has contracted any debt provable in the bankruptcy, without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it," the Court may refuse or suspend the order of discharge. But in my opinion the words contract a debt mean really to contract in ordinary terms. The statute is a highly penal statute, and it must, in my opinion, be construed strictly. It is not suggested that the action brought by the bankrupt was frivolous. It was unsuccessful, but because it was unsuccessful it does not necessarily follow that it was frivolous, and even if it were so the statute does not apply, as only frivolous and vexatious defences to actions are referred to in the section (section 28, sub-section 3 (e)). The conduct of the bankrupt is not impeached upon any other ground. I therefore come to the conclusion that the conduct of the bankrupt in bringing this action against the Gas and Water Company—and looking to the

fact that it is the only part of his conduct which can be impeached—is not sufficient to cause me to refuse the discharge, and the discharge will therefore be granted.

1884.
IN RE
J. WILLIAMS.

PRACTICE.

IN RE OWEN, EX PARTE OWEN.

COURT OF
APPEAL.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g), and sections 5 and 7—
Appeal to set aside Receiving Order—Irregularity of Bankruptcy Notice and
Petition—Bankruptcy Petition in Name of Partners—Bankruptcy of One
Partner between Service and Hearing of Petition—Amendment.*

BEFORE
BAGGALLAY,
L.J.,
COTTON, L.J.,
LENDLEY, L.J.
1884.

THIS was an appeal on behalf of the debtor *Owen*, to set aside a receiving order which had been made against him in the County Court of Canterbury.

May 2.

The facts of the case were as follows :—

On November 30th, 1883, Messrs. *Edward* and *Frank Peyton*, who had for some time carried on business together in partnership, issued a writ against the debtor *Owen* for a debt due to them on a bill of exchange for 183*l*.

On December 20th judgment was obtained.

On December 12th, however, between the date of the issue of the writ and obtaining judgment, *Edward Peyton* filed a petition for liquidation, and one *Harrison* was appointed receiver.

On January 14th, 1884, *Frank Peyton*, professing to act on behalf of the firm of *E. and F. Peyton*, issued a bankruptcy notice against *Owen* for the sum due on the judgment to *E. and F. Peyton*, and the debtor having failed to comply with the terms of this notice on January 26th, a petition was presented, signed by *Frank Peyton* for *E. and F. Peyton*.

On February 28th a resolution was passed in the liquidation proceedings of *Edward Peyton* for the liquidation of his estate by arrangement, and *Harrison* was therein appointed trustee.

1884.
IN RE OWEN,
EX PARTE
OWEN.

On March 25th a receiving order was made on the petition presented by the *Peytons* against *Owen*.

The debtor now appealed from this order on the ground that *Eduard Peyton* had on December 12th presented the liquidation petition, under which resolutions for the liquidation of his estate by arrangement had since been registered, and a trustee appointed.

Cooper Willis, Q.C. (*F. Cooper Willis* with him), for the appellant.

The point is this. By virtue of the petition for liquidation presented by *Eduard Peyton* on December 12th, and the resolution passed on February 28th, by the doctrine of relation back, the partnership was dissolved from December 12th, and from that time the debt ceased to be due to the partners jointly, but was a debt due to them as tenants in common. It ceased to be a joint debt. There was no joint debt when the petition was presented; there was no joint debt when the bankruptcy notice was issued. The bankruptcy notice and the petition served and presented by *Frank Peyton* were irregular. (*Baker v. Goodair*, 11 Ves. 83, side note, "Effect of the relation under a separate commission of bankruptcy making the assignees and the solvent partner tenants in common from the date of the act of bankruptcy.") The partnership was dissolved upon December 12th, and from that time the liability of *Owen* to the firm was held by *Frank Peyton* in common with *Harrison*. There was no debt to *E.* and *F. Peyton* at the time of the issue of the bankruptcy notice, because by the doctrine of relation back it was due to *Frank Peyton* and *Harrison*. But when the receiving order was made the doctrine of relation back need not be referred to. The liquidation of *Eduard Peyton* had then actually been resolved on and his property was actually vested in *Harrison*.

[BAGGALLAY, L. J.: The proper course would have been to make *Harrison* a party.]

[COTTON, L. J.: The Judge, if the facts had been brought before him, ought to have ordered the petition to stand over in order that *Harrison* might be made a party.]

I submit that the simplest course for your Lordships is to discharge the order, leaving the parties to do what they think best.

I ask that the order may be discharged. There was no debt due to these persons when the bankruptcy notice was issued. Upon the resolutions for the liquidation of *Edward Peyton* being registered, the title of *Harrison* related back to December 12th.

1884.
IN RE OWEN,
EX PARTE
OWEN.

In the case of *In re Hodges*, L. R. 8 Ch. App. 204; 42 L. J. Bank. 56; 28 L. T. 323, which was a case where a debtor's summons was taken out in the name of the secretary of a company limited, for a debt due to the company, it was held by the Court of Appeal that the summons was irregular, and Lord Selborne said that in such cases "all proper forms must be strictly complied with." In all questions of this kind special strictness must be observed.

[LINDLEY, L. J.: If the debt was originally due to *F.* and *E. Peyton*, could not one of the partners afterwards proceed?]

I submit not in a case like this; whether the judgment was right or not there was no debt due to *Edward Peyton* when the bankruptcy notice was issued by reason of the doctrine of relation back. Further, I contend that the disregard of the bankruptcy notice by *Owen* was not an act of bankruptcy, as no debt was under the circumstances due to *E.* and *F. Peyton*.

F. C. Willis followed.

I wish to call attention to the Form of the Bankruptcy Notice in this case. It is in form No. 6, in the Appendix of Forms to the Bankruptcy Rules, 1883, and gives notice to the debtor to "pay to *E.* and *F. Peyton*," &c. Upon the face of that notice it is clear that the debtor could not have compounded to the satisfaction of *E.* and *F. Peyton*, because *E.* and *F. Peyton* had not a debt due by reason of the doctrine of relation back.

[CORRON, L. J.: Could not the continuing and solvent partner receive on behalf of his late partner? Would not payment to the solvent partner be sufficient?]

I submit not, when the other partner has a representative existing. *Harrison* was his representative. If *Owen* had tendered the money the right persons to accept it were *Harrison* and *Frank Peyton*, who ought to give the receipt. The debtor had to satisfy

1884.
IN RE OWEN,
EX PARTE
OWEN.

the persons jointly at whose request the bankruptcy notice was issued, and if one is represented by another person the debtor had to satisfy one in conjunction with the representative of the other.

Procter for the petitioning creditors.

I appear on the other side, but I am willing to leave the matter in your Lordships' hands. I do not oppose the order being discharged without costs. At the same time it appears to be a somewhat startling proposition that a solvent member of a firm cannot give a full discharge for his partner, when in case of death one partner can do so without joining the executors or administrators of the other.

BAGGALLAY, L. J. :

Judgment.

This is a case of considerable complication. The difficulty of it is also much increased from the fact that there has been no argument on the opposite side. The effect of that is to make the Court more vigilant; but it is impossible not to see that there is evidently a wish to get rid of the order. I need not repeat the dates, but it is contended that at the time when the order was made the petition was not properly constituted, inasmuch as between the presentation of the petition for a receiving order and the time when it was made the proceedings in liquidation had been resolved upon. I think that *Harrison* should have been a party to the petition. That inaccuracy is sufficient for us to say that the order ought to be discharged. But there is the further question, upon what terms? I think it only a reasonable condition to discharging the order to give leave to the solvent partner to amend the petition by adding *Harrison*. If that amendment is not made within a reasonable time, however, the petition will be dismissed with costs.

COTTON, L. J. :

I am clearly of opinion there was a good act of bankruptcy against the debtor, and that we ought to do now that which, if the facts had been before it, the Court below ought to have done. It ought to have corrected the irregularity in the petition. The liquidation proceedings had been resolved upon, and a trustee appointed, and he ought to have been made a petitioner. I think

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4, ESSEX COURT,
 TEMPLE, E.C.
July 10th, 1884.

that leave should be given to amend within a week, and if that is not done, the petition must be dismissed with costs.

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IN RE OWEN,
EX PARTE
OWEN.

LINDLEY, L. J. :

I am also of opinion that the petition ought to have been amended. The trustee in the liquidation must now be added, and if he is not added within a week the petition must be dismissed with costs.

Solicitors : *Rezworthy* for the appellant.

Blewitt & Tyler for the petitioning creditor.

CASES relied upon or referred to :—

Baker v. Goodair, 11 Ves. 83.

In re Hodges, L. R., 8 Ch. App. 204 ; 42 L. J., Bank. 56 ; 28 L. T. 323.



PRACTICE.

COURT OF APPEAL. IN RE DIXON AND WILSON, EX PARTE DIXON AND WILSON.

BEFORE
BAGGALLAY,
L.J.,
COTTON, L.J.,
LINDLEY, L.J.

Bankruptcy Act, 1883, Section 4, Sub-section 1 (a); Section 7, Sub-section 3; Sections 15, 17 and 18—Refusal to allow Scheme of Arrangement before Receiving Order.

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May 2.

Held :—(1) That the fact that a large majority in number and value of the creditors of a debtor have assented to a deed assigning to trustees all the debtor's property for the benefit of his creditors generally, is not a "sufficient cause" within the meaning of section 7, sub-section (3) of the Bankruptcy Act, 1883, for dismissing a petition for a receiving order against the debtor presented by a dissenting creditor even for a small amount; such receiving order being founded on the act of bankruptcy committed by the execution of the deed.

It is the intention of the legislature that proposals for a composition or scheme of arrangement shall only be entertained after a receiving order has been made.

(2) That an official receiver ought not to appear at the hearing of an appeal from a receiving order, unless it is necessary for him to do so for the purpose of bringing some special circumstance to the notice of the Court; and this special circumstance the Court will take into consideration when the costs are applied for.

THIS was an appeal to set aside a receiving order made against the debtors, *Dixon* and *Wilson*, in the County Court at Sunderland.

The facts of the case were as follows :—

On March 11th last the debtors, *Dixon* and *Wilson*, who carried on business as shipowners at Sunderland, called a meeting of their creditors, for the purpose of laying before them their position.

A balance-sheet, showing the state of the debtor's affairs, was produced, and five creditors were appointed as a committee to inquire into the matter, and make a report to an adjourned meeting.

On March 18th the adjourned meeting was held, and as there appeared to be considerable assets, the committee reported that, after due inquiry, they were of opinion that the estate might be kept out of the Bankruptcy Court, and the matter otherwise arranged.

For this purpose a deed was drawn up and submitted to the creditors, bearing date March 18th, 1884, and made between *Dixon* and *Wilson*, the debtors, of the first part; three creditors, afterwards called "the trustees," of the second part; the joint creditors, whose names were specified in a schedule, of the third part; the separate creditors of *Dixon*, whose names were specified in the schedule, of the fourth part; and the separate creditors of *Wilson*, whose names were specified in the schedule, of the fifth part; and this deed witnessed that, in consideration of the release and discharge granted by the creditors to the debtors, the said debtors granted and assigned all their real and personal property to the trustees, upon trust to sell and dispose of the saleable portion of such property, and to collect any debts owing to the debtors, and to stand possessed of the proceeds of the joint estate in trust to pay the costs incurred in preparing the balance sheet and the deed, &c., and of investigating and realizing the debtors' estate, &c., and to make any payments, &c. which would be entitled to be paid in full out of the joint estate in case of bankruptcy, and finally to divide and distribute any residue among the joint creditors in the manner adopted if the estate were administered in bankruptcy, and by such instalments, and at such times, as the trustees, or a majority of them, might direct.

Provisions were also inserted in the deed with regard to the separate estate of each debtor, with similar trusts in favour of the separate creditors, it being provided that the trustees should observe in the distribution, both of the joint and separate estate, the order and practice of the Court of Bankruptcy; while, until the sale of any shares of ships, the trustees were empowered to join the co-owners in navigating and managing such ships, and were further empowered to pay any unpaid calls in incorporated companies, in order to avoid forfeiture, in each case being indemnified against loss out of the trust estate. In consideration of this, the debtors were fully released and discharged by the joint and separate creditors.

On March 18th, out of twenty-four creditors, eighteen, whose debts amounted to 18,000*l.*, were in favour of the deed, and afterwards executed it. Three creditors, whose debts amounted to 500*l.*, neither assented to nor dissented from the deed, while

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the remaining three, whose debts amounted to 1,000*l.*, refused to assent to it. The deed was also subsequently executed by the debtors and the trustees.

On March 25th one of the three dissenting creditors, *J. Parker*, whose debt amounted to 500*l.*, presented a petition for a receiving order against the debtors in the Sunderland County Court, the act of bankruptcy alleged being the assignment made by the debtors to trustees of all their property for the benefit of their creditors generally. (Bankruptcy Act, 1883, section 4, sub-section 1 (a).)

On April 17th the receiving order asked for was made, and against this the debtors now appealed.

E. Cooper Willis (*Finlay Knight* with him) for the appellants :

I admit that the deed is an act of bankruptcy under sub-section 1 (a) of section 4 of the Bankruptcy Act, 1883. The point is, whether, notwithstanding a good act of bankruptcy and a good petition, there was not other "sufficient cause" why the Court should not make the order. Sub-section 3 of section 7 of the Act provides that, "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." I submit that if a deed, such as this, is a reasonable deed, and the creditors were consulted upon it, although it may be an act of bankruptcy, it is a reasonable and sufficient cause why the receiving order should not be made. The Court should say that, having regard to all the circumstances of the deed, it is so reasonable that the Court will not make an order. The Court has judicial discretion in a case of this kind. There is certainly nothing unreasonable in the deed. It effects administration in exactly the same manner as a bankruptcy would ; but there is the great advantage, that it causes less expense to the estate, and consequently, of course, to the creditors. If, without consulting the creditors, or only two or three of them, the debtors had chosen to execute a deed of this kind, it would be very different. But where, as in this case, the debtors called all their creditors together, and told them to take their own steps, and

do what they pleased ; where a committee was appointed, an investigation made, and such and such things appeared best to be done ; where it was decided to take the course proposed by a very large majority sufficient to carry any resolution, I submit strongly that that was the reasonable and proper course, and clearly is a sufficient cause why no order should be made. The creditors were surely best qualified to judge ; they say the best course is what has been done ; it was for their own interest solely. Then the business has been carried on for a time ; the effect of the receiving order is the immediate stoppage of the business. The business is at a standstill until a special manager is appointed.

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[LINDLEY, L. J. : May not the words of the section, "other sufficient cause," refer to a case where the friends of the debtor come forward, or a guarantee is given of payment in full.]

Yes ; but they mean something more. Under the new Act, after a receiving order is made, the creditors, under section 18, may entertain a proposal for a composition or scheme of arrangement. The deed in this case is surely such an arrangement as the creditors would approve of. The effect of the receiving order is, in my opinion, only calculated to cause extra expense, and make the creditors do over again what they have done. The petition is presented by one creditor for a small amount, solely for the purpose of pressure, and the delay would not benefit him, and cause extra expense to the other creditors. There was no objection to a full examination into all the circumstances when the receiving order was made. If that had been refused, it would be another thing. Even now the debtors are willing that the decision of the Court should be postponed, and the case remitted, in order that a full examination may be made. The Court has a very wide discretion ; it is at liberty to examine all concerned, and, if it finds the arrangement will be beneficial to the creditors, it may refuse the receiving order. One small creditor ought not certainly to be able thus to interfere with what a very large majority of the creditors, both in number and value, think is the best course in their own interests to pursue.

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Finlay Knight followed.

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The question is, whether it shall be in the power of one creditor to a small amount to thwart the wishes of those of a large amount. He can do so unless due effect is given to the words of section 7, sub-section 3 of the Act. He is able to say: "Pay me my debt in full, or else I will go on and compel a receiving order." The deed would not be an act of bankruptcy with regard to any creditor who assented to it. One who will not assent can, therefore, dictate the terms. In *Ex parte King, In re Davies* (L. R., 3 Ch. Div. 461; 45 L. J., Bank. 159), it was decided that, "when the Court sees that a bankruptcy petition has been made use of for an inequitable purpose, as, for instance, to extort money from the debtor, it will refuse to make an adjudication, even though there is a good petitioning creditor's debt, and an act of bankruptcy has been committed." The case of *Ex parte Griffin, In re Adams* (L. R., 12 Ch. Div. 480; 48 L. J., Bank. 107) is to the same effect. In the present case the creditors were satisfied thoroughly; if they were satisfied there is no reason why a receiving order should be made. An easy and expeditious method of administration is thus thwarted, and it lays open an inducement for one creditor to play a waiting game to the loss of all the others.

Winslow, Q.C. (*Herbert Reed* with him), for the petitioning creditor, were not called upon.

BAGGALLAY, L. J. :

In this case, on March 25th, a petition for a receiving order was presented against the debtors, *Dixon and Wilson*, in the County Court at Sunderland, and this petition came on for hearing on April 17th. By sub-section (3) of section 7 of the Bankruptcy Act, 1883, it is provided that, "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." Now in this case there is no question as to the debt, as to the act of

bankruptcy, or as to the petition. It is not suggested that the Court was satisfied that the debtor was able to pay his debts, but it is suggested that there was "other sufficient cause" why no order should be made. The Court, however, was not satisfied of this, and it made a receiving order, and directed that the public examination should be held on May 15th. Now the appellant says that there was sufficient cause not to make a receiving order by reason of a deed executed by the debtors at a meeting held on March 18th. At that meeting a deed was prepared and assented to by a very large proportion of creditors. Whether all the creditors were present or not I cannot say, but at any rate the large majority of eighteen out of twenty-four, representing debts to the amount of 18,000*l.*, assented to the deed; three creditors, representing debts to the amount of 500*l.*, remained neutral; and three, representing debts to the amount of 1,000*l.*, refused their assent. *Parker*, the petitioning creditor, was one of these last three, and his debt was to the extent of some 500*l.* This deed appointed three creditors trustees for the general body, and it was an assignment of the whole of the property of the debtors to these trustees for the benefit of the creditors generally. This form of deed was once a well-known one, but it is admitted that it is not to be regarded generally to the benefit of the creditors. We have now, however, to decide on the Bankruptcy Act, 1883. We have to consider whether the execution of such a deed and the assent of the majority of the creditors is such "other sufficient cause" as to justify the Court in refusing to make a receiving order. In my opinion, in deciding this question, we ought to look at the whole scope of the Act. Section 15 of the Act provides (1) that "As soon as may be after the making of a receiving order against a debtor a general meeting of his creditors (in this Act referred to as the first meeting of creditors) shall be held for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that the debtor shall be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property." The clear object of the Act is, that the proposal for a composition or scheme should take place after a receiving order is made. Then that section is followed up by section 17, dealing with the public examination of

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the debtor, and by section 18, which treats fully the question of a composition or scheme of arrangement. To say that, outside the Act and in lieu of a receiving order being made, with all the security consequent upon it, an arrangement of the kind proposed should be sanctioned, appears most unwise. In my opinion it would be utterly contrary to the whole scope of the Act if a majority of creditors could prevent a receiving order being made by saying that they would accept an arrangement of this kind. It would open a door to fraud, which, if the proceedings were more open, could not take place. I do not suggest that there was fraud in this case, but I rest my decision on the fact that, in my opinion, it would be entirely contrary to the scope of the Act if a private arrangement of this kind could oust the right to have a receiving order made. I am clearly of opinion that what is here suggested as to the deed being a sufficient cause for setting aside the receiving order cannot be regarded as the true interpretation of the Act. There are many ways in which a sufficient cause might be shown which would be good reason for the Court to refuse an order, but this is not one of them, and the appeal must be dismissed.

COTTON, L. J. :

It is suggested that under sub-section (3) of section 7 of the Bankruptcy Act, 1883, that on the facts of this case there is a "sufficient cause" why no receiving order should be made. I must say that in my opinion the appeal raises a most important question. The only thing, however, we now have to consider is, whether it is a sufficient cause for refusing a receiving order that a deed has been made assigning all the property of the debtors to trustees for the benefit of their creditors. Now it is important to notice that an assignment of this kind is the first "act of bankruptcy" specified under the new Act in section 4 of it. Under some of the Acts relating to bankruptcy previous to the year 1869, special provision was made for deeds of this kind. Under the Bankruptcy Act, 1869, such arrangements, except such as took place under a petition for liquidation, were abolished. Now under the new Act the tendency of the Act is even still more strict. It allows a composition or arrangement indeed, but.

with still greater restrictions. It imposes on the Court the duty of sanctioning such arrangements—in my opinion a most wise provision. The Court is to take care that such arrangement is beneficial for the creditors, and the duty is imposed upon it of saying whether the resolutions which the statutory majority of creditors may have approved are such as ought to receive its sanction. In my opinion, in an Act of this restrictive tendency, it would be most extraordinary, where no mention is made in the Act with respect of a deed of this nature except that it shall be an act of bankruptcy, if such a deed thus made outside the Court and outside the bankruptcy could be approved. It would be entirely contrary to the object of the Act, and I am clearly of opinion that the registrar was right in making the receiving order.

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LINDLEY, L. J. :

I am also of the same opinion. The case is an invitation to the Court to say that the majority of creditors can bind the minority to a scheme without complying with the sections of the Act of Parliament, which have been passed for the purpose of pointing out what course ought to be adopted when a scheme of arrangement has been decided upon. This might in fact be an attempt by the majority to screen the debtor from public examination. It has been argued that the case comes within sub-section (3) of section 7 of the Act, but when we find in the Act most careful rules laid down for carrying out the very thing the deed would do, and we are asked to set aside the scheme provided in the Act, and assent to another, I am clearly of opinion that if we did assent to such a course we should be acting contrary to the principle on which Acts of Parliament ought to be construed. The appeal must be dismissed with costs.

M. D. Chalmers for the official receiver.

The official receiver has been served with notice of the appeal and asks for costs. He was a necessary party, and if the receiving order had been discharged he would have had to obtain protection from the Court for his acts in the meantime. In *Ex parte Ward*, *In re Ward*, L. R., 15 Ch. Div. 292, which case was an appeal from the refusal of the registrar sitting as chief judge to annul an

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adjudication of bankruptcy, and the trustee had not been served with notice of the application, Lord Justice JAMES said: "The trustee ought to have been served. After the adjudication has been made the petitioning creditor is not the only person interested in the matter. The adjudication enures to the benefit of all the creditors."

Under the new Act the official receiver acts as trustee until a trustee is appointed by the creditors. The duties of the official receiver are very important (Bankruptcy Act, 1883, sections 69 & 70). He would be neglecting those duties if he did not appear in a case of this kind, and he is entitled to his costs.

E. Cooper Willis, Q.C. :

Why should the official receiver be allowed his costs? He has no interest in the matter; his duties do not commence until after the receiving order has been made; he has done nothing, and has made no report, nor is it suggested that he had anything to report. It did not make any difference to the official receiver what view this Court took with regard to the appeal. In *Ex parte Izard, In re Moir* (L. R., 20 Ch. Div. 703; 51 L. J., Ch. 939; 47 L. T. 212), it was held that "Notice of an appeal from a registrar acting as chief judge ought not (even if it is *ex parte*) to be addressed to or served on the registrar. Notice of an *ex parte* appeal was addressed to and served on the registrar, and he appeared by counsel on the hearing. It was held that the appellant ought not to be ordered to pay the registrar's costs."

BAGGALLAY, L. J. :

We think it desirable that some rule should be laid down by which, under ordinary circumstances, the Court will feel bound. At the same time, of course, we wish it to be understood that the Court, in any case where there are special circumstances, may feel compelled to deviate from it. We are certainly of opinion that it is very desirable that costs should in no case be incurred by the unnecessary appearance of anybody, and especially by the unnecessary appearance of the official receiver. We are also of opinion that as a rule the official receiver ought not to appear unless it is necessary for him to do so for the purpose of bringing

some special circumstance to the notice of the Court, and this special circumstance the Court will take into consideration when the costs are applied for. It may happen also that there may be particular costs which may arise under Rule 128 of the Bankruptcy Rules, 1883, which provides “(1) Upon the presentation of a petition either by the debtor or by a creditor, the petitioner shall deposit with the official receiver the sum of five pounds, and such further sum (if any) as the Court may from time to time direct, to cover the fees and expenses to be incurred by the official receiver.” In such a case, when there may not be a sufficient protection for the official receiver, some special provision may have to be made. In the present case, however, we are of opinion that, looking to the fact that it is the first occasion on which the matter has been brought to the notice of the Court, and considering all the circumstances, that the official receiver ought to be allowed to have his costs out of the estate.

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COTTON, L. J., and LINDLEY, L. J., concurred.

Appeal dismissed with costs.

Solicitors: *Hicken & Graham* (for *Smiley*, Sunderland) for the appellants.

Brownlow & Horne (for *Arthur Crow*, Sunderland) for the petitioning creditor.

The Solicitor for the Board of Trade for the official receiver.

CASES relied upon or referred to:—

Ex parte King, In re Davies, L. R., 3 Ch. Div. 461; 45 L. J., Bank. 159.

Ex parte Griffin, In re Adams, L. R., 12 Ch. Div. 480; 48 L. J., Bank. 107.

Ex parte Ward, In re Ward, L. R., 15 Ch. Div. 292.

Ex parte Izard, In re Moir, L. R., 20 Ch. Div. 703; 51 L. J., Ch. 939; 47 L. T. 212.

HIGH
COURT OF
JUSTICE.

BEFORE
MR. JUSTICE
MATHEW.

1884.

May 8.

IN RE COOK, EX PARTE DUDGEON.

Bankruptcy Act, 1883, Section 44, Sub-section (iii)—Reputed Ownership.

Held :—That where a picture was lent by the owner of it to the artist who had painted it for the purpose of being exhibited by him in a public gallery amongst other pictures painted by him and exhibited there for sale, such picture did not pass to the trustee in bankruptcy on the artist becoming bankrupt, as being in his order and disposition within the meaning of Section 44, Sub-section (iii) of the Bankruptcy Act, 1883.

THIS was an application made to Mr. Justice MATHEW as acting bankruptcy judge during the absence of Mr. Justice CAVE, on behalf of *J. H. Dudgeon*, for the delivery up of a certain picture entitled “Sunset—North Wales,” which was at present in the possession of the trustee in the bankruptcy of *Henry Cook*.

The bankrupt, who was a landscape and portrait painter, presented his petition in February last.

For some time past he had occupied what was known as the “Drawing Room” at the Egyptian Hall, Piccadilly, as a picture gallery where he exhibited his pictures for the purpose of sale.

At the date of the bankruptcy petition the picture claimed, which it appeared had been presented some time ago by the bankrupt to Mr. *Dudgeon*, was being exhibited with others at the Hall, and had been taken possession of by the trustee.

Spencer for Mr. Dudgeon.

The point is whether the “reputed ownership” clause of the recent Bankruptcy Act, 1883, applies in such a manner as to entitle the trustee to claim this picture, it having been allowed to remain in the possession of the bankrupt with the consent of the true owner. I submit that it does not do so. That clause (section 44), after declaring what goods shall not be divisible amongst a bankrupt’s creditors, makes certain provisions as to what goods shall be divisible amongst such creditors, and specifies (iii) “All goods being, at the commencement of the bankruptcy, in the pos-

session, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section." But by this provision it will be seen the goods must be in the bankrupt's possession, order or disposition in his trade or business. The pictures here were in a gallery for the purposes of exhibition, but they were not advertised in any way for sale as the bankrupt's property. There was a catalogue, and in that catalogue several of the pictures were described as the property of persons whose names were given. The facts are that the bankrupt promised during the time he was resident in Rome to give Mr. *Dudgeon* a painting on account of certain services rendered to him by Mr. *Dudgeon* during the years 1882 and 1883, and immediately on his arrival in England he requested Mr. *Dudgeon* to select one of three. Mr. *Dudgeon* selected the picture "Sunset—North Wales," and at his suggestion it was kept with the bankrupt for exhibition with the other paintings.

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DUDGEON.

Brough for the trustee.

It is true that some of the pictures are described in the catalogue as the property of certain persons, whose names are given, but by far the majority of them are not specified as belonging to any particular person. It appears that the whole of the pictures mentioned in the catalogue were painted by the bankrupt himself. The picture now claimed is certainly not described in the catalogue as the property of Mr. *Dudgeon*. In treating of the question of property of which the bankrupt is reputed owner, Mr. Robson, in his well-known work on Bankruptcy Law, states at page 444, 3rd ed., "that the principles applicable to goods and chattels originally the property of the bankrupt differ from those applicable to goods and chattels originally the property of other persons." And at page 445 he says: "With respect to goods and chattels of this description, the presumption is that the ownership of the bankrupt continues whilst the goods remain in his possession, order or disposition." The learned editor supports that statement by a

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reference to the case of *Lingard v. Messiter* (1 B. & C. 308), by which it was decided "that in an action by the assignees of a bankrupt brought to recover property in the bankrupt's possession as reputed owner, the plaintiffs proved that the bankrupt had once been the real owner of the goods in question, and that he continued in possession of them until he committed an act of bankruptcy. *Held*, that this was *prima facie* evidence that he continued in possession as owner, and that it then lay upon the defendant to prove that the bankrupt had ceased to be the reputed owner."

In the present case there is nothing to distinguish that the painting in question belonged to Mr. *Dudgeon*. I may also mention to your Lordship that various claims have been made against the trustee for the delivery of pictures under similar circumstances, and the present is brought forward as a kind of test case, as the trustee feels some difficulty as to the course he ought to pursue in the proper discharge of his duties.

MATHEW, J. :

I am of opinion that section 44, sub-section (iii) does not apply to the present case. The case is peculiar and exceptional. To my mind there was nothing to lead the public to suppose that the pictures exhibited at the Egyptian Hall were the property of the bankrupt. And, further, such pictures were not advertised in any way for sale as his. If the pictures had been in the shop of a picture dealer the case might have been different. I am clearly of opinion, however, that the trustee has acted quite rightly under the circumstances in bringing the matter to the notice of the Court. I think the proper order to be made in this case will be an order directing delivery of the picture claimed to the applicant with costs out of the estate.

Solicitors : *Fairfoot, Webb & Rooke* for Mr. *Dudgeon*.
Lumley & Lumley for the Trustee.

CASE relied upon :—

Lingard v. Messiter, 1 B. & C. 308.

PRACTICE.

IN RE J. PEARCE, EX PARTE THE BOARD OF TRADE.

BEFORE MR.
JUSTICE CAVE.*Bankruptcy Act, 1883, Section 102; Bankruptcy Rules, Nos. 20, 22, 23, 26 and 49—Motion to commit—Affidavit of Service not mentioned in Notice of Motion.*

1884.

May 26.

THIS was a motion to commit.

On April 7th last (see *ante*, p. 56), an order was made, upon *H. Brett* and *H. A. Dubois*, trustees in the bankruptcy of *J. Pearce*, directing them to pay over to the Bankruptcy Estates Account at the Bank of England the sum of 158*l.* 12*s.* 9*d.*, being undistributed funds and dividends remaining in their hands. (Bankruptcy Act, 1883, section 162.)

This order had not been complied with, and the present application was in consequence made for an order of committal.

M. D. Chalmers for the Board of Trade :

It will doubtless be in your Lordship's recollection that the order was made on April 7th last. The trustees were present in Court, and notice has been personally served on them.

[Counsel in support of the application read an affidavit of *John Smith*, and was proceeding to read the affidavit of one *Crouchurst* to prove the service of the order.]

Johnson, solicitor, for Dubois :

I object. I say first that service has not been made. Further, I object to the reading of the affidavit of *Crouchurst* on the ground that his name was not mentioned in the notice of motion. In the notice the affidavit of *John Smith* only is mentioned.

M. D. Chalmers :

The affidavit of *Crouchurst* merely proves that the notice was served regularly. Rule 49 of the Bankruptcy Rules, 1883, says—

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(1) Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the Court. (2) Except by leave of the Court, no order made *ex parte* in Court founded on any affidavit shall be of any force, unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion. Nothing is said about notice to read the affidavit being required.

Johnson :

The Rules applicable are Nos. 20 and 22. Rule 20 provides that, "Where any party other than the applicant is affected by the motion, no order shall be made unless upon the consent of such party duly shewn to the Court, or upon proof that notice of the intended motion and a copy of the affidavits in support thereof have been duly served upon such party; provided that the Court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail serious mischief, may make any order *ex parte* upon such terms as to costs and otherwise, and subject to such undertaking (if any) as the Court may think just; and any party affected by such order may move to set it aside." Rule 22 provides that, "Where the respondent intends to use affidavits in opposition to the motion, he shall deliver copies of such affidavits to the applicant not less than two days before the day appointed for the hearing;" and by Rule 26, "Every affidavit to be used in supporting or opposing any opposed motion shall be filed with the registrar not later than the day before the day appointed for the hearing." (Reference was also made to Rules 77 and 78.)

CAVE, J. :

It is essential that personal service should be proved. I will therefore adjourn the case that this may be done.

Johnson :

I submit that your Lordship has no authority to give an adjournment. The motion is made like any other motion. It is dead, and I ask that it be dismissed. It is a motion unsupported

by evidence. A person ought not to be sent to prison without some semblance of a case being made out.

CAVE, J.:

Rule 23 gives me full power to order an adjournment, and I shall do so. The adjournment will be for three weeks.

The case of *H. Brett* was also adjourned.

Solicitors: *The Solicitor to the Board of Trade* for the Board of Trade.

Johnson for Dubois.

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IN RE
J. PEARCE,
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IN RE LACY, EX PARTE TAYLOR.

Bankruptcy Act, 1883, Section 6, Sub-section (2); *Schedule 2, Rules 9, 10, 12a*;
Section 7, Sub-section (3).

DIVISIONAL
COURT.

BEFORE
CAVE, J.,
A. L. SMITH, J.

1884.
May 28.

Held :—(1) That the estimate of the value of his security required of a secured creditor by Section 6, Sub-section (2), of the *Bankruptcy Act*, 1883, does not necessarily mean that such estimate shall be the exact value, and the fact that a secured creditor has undervalued his security is not a ground for dismissing a bankruptcy petition presented by him.

(2) A secured creditor so presenting a petition would be bound to give up the security to the trustee in the bankruptcy if he wishes to take it at the value placed by such secured creditor upon it in the petition.

THIS was the first case under the *Bankruptcy Amendment Act*, 1884 (Appeals from County Courts).

It was an appeal to a Divisional Court, from an order made by the registrar of the County Court at Wandsworth, on May 2nd last, dismissing without costs a bankruptcy petition which had been filed against the debtor.

The facts of the case were as follows :—The petition in question was founded on a judgment for 59*l.* 16*s.* 4*d.*, which had been obtained by *Taylor*, the petitioning creditor, against the debtor, *W. S. Lacy*.

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TAYLOR.

At the time the debt was incurred for which the judgment was obtained, a charge by mortgage upon certain land was given as security by the debtor to the creditor, and this security was stated to be of the value of 60%.

In his petition, however, the petitioning creditor valued the security thus held by him at 9% only, and the registrar, on the ground that the security had been wrongly valued for the mere purpose of supporting the bankruptcy petition, made an order directing that it should be dismissed.

From this order the petitioning creditor now appealed.

Atherley Jones for the petitioning creditor :

The point is, whether it is necessary for a petitioning creditor to state in his petition the true value of his security. I submit that the registrar decided the case under a total misapprehension of the provisions of the statute. Section 6, sub-section (2), of the Bankruptcy Act, 1883, provides, that "If the petitioning creditor is a secured creditor he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors, in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor." The position of secured creditors is also dealt with in Schedule 2 of the Act, where it is provided :—

"(9) If a secured creditor realizes his security he may prove for the balance due to him, after deducting the net amount realized. (10) If a secured creditor surrenders his security to the official receiver or trustee for the general benefit of the creditors, he may prove for his whole debt. (11) If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed. (12a) Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value :—" The provisions of the new

Act are for the purposes of the case the same as under the Act of 1869, and those so far as they affect the point do not differ from the previous Acts. The creditor may repudiate at any time, and he may place any value upon his security. It is obvious that the object of making this provision to assess the value of a security was in order that if the trustee wishes to take the security he shall only pay the creditor the sum at which he has valued it. The estate would get the benefit. It was never intended that the real value should be correctly estimated and correctly stated in the petition. The provision is not made for the protection of the debtor, but for the creditors generally. The penalty for putting an inadequate value is that of having to surrender it at that price if the trustee wishes to take it. The creditor can disclaim the security altogether if he likes: and that goes to the root of the matter. This petition was not dismissed on the merits, but solely on this simple point. I submit that there is no provision in the Act which required that the value assessed shall be the true value. As a matter of fact the opposite appears to be the case.

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F. O. Willis for the debtor:

The registrar did not decide wholly on the technical point. The petition was dismissed also upon the ground that it was not presented *bonâ fide*, but to put pressure on the debtor.

[CAVE, J.: We cannot deal with that now. We can only deal with the point before us.]

Two points were especially raised before the registrar—(1) Whether the County Court was the proper Court in which to file the petition. (2) If the value of the security was really 60%, and the value stated was 9%, a petition could be validly filed.

[CAVE, J.: The registrar dismissed the petition on the ground that the estimate was too low.]

Section 7, sub-section (3), of the Bankruptcy Act, 1883, provides that, "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made,

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the Court may dismiss the petition." Upon that the registrar has in this case come to the conclusion that there is sufficient cause to dismiss. If it were otherwise in cases of this kind very great hardship might arise. A creditor might say to his debtor, I will make you bankrupt; I have security sufficient to pay myself, but I will make you a bankrupt nevertheless.

[A. L. SMITH, J. : How if the creditor said he would give up his security? In that case *prima facie* nothing could prevent the man being made a bankrupt.]

[CAVE, J. : It is a simple point we have to decide.]

I submit that the provisions of Schedule 2, which have been referred to, only have effect after a trustee is appointed.

CAVE, J. :

I am of opinion that this appeal must be allowed. The order of the registrar must be set aside, and the case must be remitted to him. Under section 6, sub-section (2), of the Bankruptcy Act, 1883, we find, "If the petitioning creditor is a secured creditor, he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors, in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor." Now all the section requires is that the creditor shall give an estimate, and that he has done. He is at liberty to give up the security altogether. This matter tends to keep him straight. He is bound by the estimate he puts on. It is true that according to the provisions of Schedule 2 he may amend, but in order to entitle him to this privilege he must show *bona fides*. If, as here, a creditor values his security at 9%, which is said to be worth 60%, he can only get 9% from the trustee. There is nothing in the section which requires that the estimate shall be the exact value; and the provisions of the schedule, and the fact that the creditor may give up his security, seem to point in the contrary direction. I see no hardship to the debtor. If he is

solvent no attempt of this kind would be made. If there are other creditors they would get the benefit. This is the only point, on which the registrar dismissed the petition, with which we have to deal. I am of opinion that it was a bad point, and that the case must go back. We do not go into the merits. All that we decide is that the point on which the petition was dismissed was bad.

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A. L. SMITH, J. :

I am entirely of the same opinion. I have nothing to add. I agree that the point is quite untenable. We have nothing to do with section 7, sub-section (3), on the present occasion.

Appeal allowed, with costs.

Solicitors: *Hurford & Taylor*, for the appellant.

R. Chamberlain, for the respondent.

JURISDICTION.

IN RE LOWENTHAL, EX PARTE BEESTY.

Bankruptcy Act, 1883, Section 102.—General Power of Bankruptcy Courts—Questions between Third Parties—Conflicting Claims to Bankrupt's Property.

BEFORE
MR. JUSTICE
CAVE.
1884.
May 29.
June 10.

Held:—That the jurisdiction conferred on the Court of Bankruptcy by Section 102 of the Bankruptcy Act, 1883, is the same as that formerly conferred on the Court by Section 72 of the Bankruptcy Act, 1869.

THIS was an application on behalf of one *J. W. Beesty* for an order directing Messrs. *Glyn, Mills & Co.*, the bankers, to deliver up to him the warrants of certain sheep skins, which warrants had been deposited with them by the bankrupt *Lowenthal* under the following circumstances:—

The applicant, *J. W. Beesty*, had, it appeared, instructed *Lowenthal*, who carried on business as a wool broker, to purchase the skins for him, and this he had done as agent to the extent of 1,747*l.*, and out of this sum 1,500*l.* had been paid by *Beesty* to the bankrupt.

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Certain of these skins had been delivered and others warehoused, as the applicant had not then room for them; the warrants had been taken, however, by the bankrupt in his own name, and these had been deposited by him with Messrs. *Glyn & Co.* as security for an advance of 600*l.*

Beddall for the applicant, J. W. Beesty.

This case was before the Court on April 9th last. The motion was then ordered to stand over until after the first meeting of creditors. That has now been held and a trustee appointed. We can get no definite answer from him, however, as to the course he will pursue, and we cannot wait longer. It is clear that whatever may be the rights of Messrs. *Glyn* the trustee has no claim whatever. The bankrupt has had 1,500*l.*—he has deposited the skins for 600*l.* Messrs. *Glyn* are willing to give up the skins on payment of the 600*l.* The facts are undisputed. My application is (1) that Messrs. *Glyn & Co.* are not entitled to hold except to the extent of 247*l.* (the balance due on the transactions), because the case is not within the Factors Acts; (2) we are willing to deposit 600*l.* and so get our skins, and have the question argued at a future day.

J. Linklater for Messrs. *Glyn, Mills & Co.*

I submit that the Court of Bankruptcy has no jurisdiction to decide between Messrs. *Glyn* and Mr. *Beesty*. They are total strangers to the bankruptcy, and the trustee can only bring a stranger into the Bankruptcy Court: the Bankruptcy Court would have no jurisdiction. Messrs. *Glyn* will settle the affair once and for all on payment of 600*l.*, but if there is to be any question as to the Factors Acts, I think I can prove that the Bankruptcy Court has no jurisdiction.

[CAVE, J.: I think you must go into the question of jurisdiction.]

The point as to jurisdiction is under section 102, sub-section (1) of the Bankruptcy Act, 1883, where it is provided that:—

“(1) Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever,

whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds."

This is not a case "in any bankruptcy." The contest between Messrs. *Glyn* and Mr. *Beesty* is in consequence of *Lowenthal's* bankruptcy. But it does not affect the bankrupt's property; it is not anything arising in a bankruptcy. Nor is the case within the words "or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." The word distribution means distribution amongst the creditors. That is the object of the Bankruptcy Act. The bankruptcy judge ought not to decide between strangers, but to administer the bankrupt's estate. The section 102 above quoted is equivalent to section 72 of the Act of 1869, except that the new Act contains an extra provision as to County Courts. Under the Bankruptcy Act, 1869, there are various authorities on this question of jurisdiction. The first case I refer to is that of *Ellis v. Silber* (L. R., 8 Ch. App. 83; 42 L. J., Ch. 666; 28 L. T. 156), in which Lord SELBORNE said:—

"Sir Richard Baggallay has argued very carefully and fully that the jurisdiction to administer justice in this case between the parties is in the Court of Bankruptcy, and ought not to be exercised here. But Sir Richard Baggallay quoted no authority, as it appeared to me, tending in the slightest degree whatever to support that proposition. The effect of the provisions in the several Acts of Parliament relating to bankruptcy is that in these cases. . . . But there was no case cited and no clause quoted from any Act of Parliament to the effect that whenever the trustee of a deed or the assignee in bankruptcy has a demand against a third person,

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which but for the bankruptcy would be proper to be prosecuted in a Court of law or in a Court of equity, the jurisdiction of the Court of law or of the Court of equity is, as against that third person, transferred to the Court of Bankruptcy. . . . That which is to be done in bankruptcy is the administration in bankruptcy."

In *Ex parte Dickin, In re Pollard* (L. R., 8 Ch. Div. 377; 38 L. T. 860), it was held that "the Court of Bankruptcy, even if it possesses jurisdiction under section 72 of the Bankruptcy Act, 1869, to enforce a simple money demand by the trustee of a bankrupt's property against a third party (as to which *quære*) ought not to exercise the jurisdiction, but ought to leave the demand to be enforced by the trustee in an action in the ordinary way." And in *Ex parte Brown, In re Yates* (L. R., 11 Ch. Div. 148; 48 L. J., Bank. 78; 40 L. T. 402), the decision was that "where a trustee in bankruptcy claims only the same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals. But where, by the operation of the law of bankruptcy, the trustee has a higher and better claim than the bankrupt (where, for instance, a transaction is impeached as a fraudulent preference or an act of bankruptcy), the Court of Bankruptcy ought to decide the matter itself." The question was whether the Court ought to exercise jurisdiction even when the trustee makes a claim; and it results from these cases that the jurisdiction of the Bankruptcy Court is confined to cases in which the trustee claims by a higher and better title than others. Here no trustee appears, and your lordship is asked to exercise jurisdiction, as against a perfect stranger, not to distribute the property for the benefit of the creditors. Also in *Ex parte Smith, In re Collie*, L. R., 2 Ch. Div. 51; 45 L. J., Bank. 116; 34 L. T. 603. In that case "C. bought goods on credit from H. After delivery, but before the time for payment, C. became bankrupt. H., when the time for payment arrived, commenced an action against S. for the price, alleging that C. had bought the goods by the authority of S., and either on account of S. or on the joint account of S. and C. S. thereupon served the trustee with a notice under Order XVI. r. 18, of the Rules of Court, 1875. The trustee then applied for and obtained in bankruptcy an order restraining S. from taking or

continuing any proceedings against the trustee under Order XVI.:—*Held*, on appeal, that this order must be discharged, for the case between H. and S. could not be tried in bankruptcy, and that S., if found liable in the action, ought not to have to try the same question again in bankruptcy between himself and the trustee.”

On the strength of those cases I submit that the Bankruptcy Court has no jurisdiction.

Beddall :

The authorities cited are those under the old Act, and are not now applicable. First, under the old Act, the Bankruptcy Court was a separate Court and had a separate jurisdiction. Now, the bankruptcy judge is a judge of the High Court, and it makes no difference whether your Lordship sits in Bankruptcy to try the case or as a judge of the Queen’s Bench Division dealing with the same facts. There is no distinction, and that being so, the old authorities have no application now. But the case does not rest there. In the authorities cited, the jurisdiction was unlimited; the question settled in each judgment was whether it was expedient or not to exercise it. The cases of *Ex parte Brown*, *In re Yates*, and *Ellis v. Silber*, above quoted, both tend to show not that the Court of Bankruptcy has not jurisdiction, but that the jurisdiction was limited only by the discretion of the Court. There was complete jurisdiction if the Court had thought it right to exercise it. With regard to the question, Is this a case within section 102 of the Bankruptcy Act, 1883? The words of the section are, all questions “which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it necessary or expedient to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.” The words are very wide and were intended to confer unlimited jurisdiction. If there could be any doubt it is completely put an end to by the proviso of the section, “provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim not arising out of the bankruptcy which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding

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consent thereto, or the money, money's worth, or right in dispute, does not, in the opinion of the judge, exceed in value two hundred pounds. The High Court is intended to have jurisdiction to adjudicate in a claim not arising out of a bankruptcy, inasmuch as the County Court is prohibited. I submit that the present case is one in which the Court should exercise jurisdiction. It is a case within section 102, whether arising out of a bankruptcy or not. It is clearly within the words "doing complete justice."

J. Linklater in reply :

The jurisdiction in bankruptcy rests entirely on the Act, and this notwithstanding the transfer to the High Court. Section 102 defines and explains what is the jurisdiction of the Bankruptcy Court. It is exactly the same as under the Act of 1869. The old Bankruptcy Court had the same rights as now, but its jurisdiction was limited as it is now. The words of the section are definite, and it says "in bankruptcy." The jurisdiction of the Court is the same as under the Act of 1869.

[CAVE, J. : I will take time to consider my judgment.]

June 10th.

CAVE, J. :

In this case Mr. *Beddall* moved, on the part of Mr. *Beesty*, for an order on Messrs. *Glyn & Co.* to deliver up to him the warrants of some sheep skins which had been deposited with them by the bankrupt by way of pledge to secure advances. The bankrupt purchased certain skins, including those in question for Mr. *Beesty*, for the sum of about 1,750*l.*, of which Mr. *Beesty* has paid 1,500*l.* The bankrupt has warehoused some of the skins in his own name, and subsequently pledged the warrant with Messrs. *Glyn & Co.*, who claim to be entitled to hold them under the Factors Acts until their advances have been repaid. Mr. *Linklater*, who appeared for them, took a preliminary objection that this Court had no jurisdiction to make the order, and, as the case is one of general importance, I took time to consider my judgment.

The Court of Bankruptcy has exclusive jurisdiction over personal claims against the bankrupt which are proveable in bankruptcy, and also over the assets of the bankrupt which come into the hands of the trustee to be administered ; and the debtors and the creditors, as the parties to the administration in bankruptcy, and the trustee, as the person interested with that administration, are subject to that jurisdiction.

The Court of Bankruptcy, by section 72 of the Act 1869, was invested with jurisdiction over third parties for the purpose of deciding all questions of priorities, and all other questions whatsoever which might arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court might deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case. The jurisdiction so given was, it should be noticed, concurrent and not exclusive, and, moreover, was discretionary, and not to be invoked as of right. The cases which were decided upon this section established, first, that where by the operation of the law of bankruptcy the Court of Bankruptcy had under this section, it ought to exercise jurisdiction (*Ex parte Brown, In re Yates*, L. R., 11 Ch. Div. 148 ; 48 L. J., Bank. 78 ; 40 L. T. 402), unless (in the case of a County Court) a large amount was at stake (*Ex parte Armitage, In re Learoyd, Wilton & Co.*, L. R., 17 Ch. Div. 13 ; 44 L. T. 262 ; *Ex parte Price, In re Roberts*, L. R., 21 Ch. D. 553 ; 47 L. T. 402). Secondly, that where the trustee claimed only the same right as the bankrupt himself would have had, the Court of Bankruptcy, if it had jurisdiction under section 72, ought not to exercise it (*Ex parte Dickin, In re Pollard ; Ex parte Brown, In re Yates*). And, thirdly, that the Court of Bankruptcy had no jurisdiction to entertain personal claims between third parties, or claims of property as between third parties, although the decision of such question might also decide which of such third parties should prove against the bankrupt's estate. It is with the third proposition alone that I am now concerned, and I will shortly refer to the authorities by which it is supported. In *Ex parte Lyons* (L. R., 1 Ch. 494 ; 41 L. J., Ch. 41 ; 26 L. T. 491) the Court of Appeal held that the Court of Bankruptcy had no jurisdiction to set aside, on the ground that it had been obtained by pressure, a bill of sale

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given by a debtor who had effected a composition to secure a bill of costs of a receiver appointed under the petition for liquidation. In that case, JAMES, L. J., observed: "The world has already been startled at the extent of jurisdiction assumed by the Court of Bankruptcy under section 72, and it behoves us to be careful before we enlarge it, and before we allow any branch of the Court of Bankruptcy to set aside solemn deeds on equitable grounds merely because they had their inception in, or were somehow connected with, a bankruptcy proceeding. The case does not come within section 72, the object of which is to provide a summary remedy in matters relating to the distribution of the estate or otherwise arising or really connected with bankruptcy proceedings. I should be sorry to limit the jurisdiction of the Court as to anything which can be said to be a matter incident to the bankruptcy proceedings. But it does not follow, because there has been a relation between two parties founded on bankruptcy proceedings that every dealing between them, having any connection with that relation, is drawn within the jurisdiction of the Court of Bankruptcy." In *In re Motion* (L. R., 9 Ch. App. 192; 43 L. J., Bank. 59; 29 L. T. 757), SELBORNE, L. C., says: "Section 72 gives the Court a very large authority to decide such questions as it may be found necessary or convenient to determine for the proper purposes of the administration in bankruptcy, but it does not, as we understand it, at all enable the Court of Bankruptcy to draw compulsorily within the sphere of its jurisdiction property, or the owners of property, not originally subject to the administration in bankruptcy." The same language is held by JAMES, L. J., in *Ex parte Pannell, In re England*, L. R., 6 Ch. D. 335; 47 L. J., Bank. 21. In *Ex parte Smith, In re Collie, Hopwood & Co.* alleged that *Collie*, who subsequently became bankrupt, had bought goods of them by the authority of *Smith, Wood & Co.*, and sued *Smith, Wood & Co.* for the price, who brought in the trustee of *Collie* as a third party; and JAMES and MEILLISH, L. J., held that the Court of Bankruptcy had no jurisdiction to try the question between *Hopwood & Co.* and *Smith, Wood & Co.* Since these cases were decided the Act of 1869 has been repealed, and the Act of 1883 substituted for it; and section 102 of the later Act contains the same provisions as that in section 72 of the Act

of 1869, with the following addition :—" Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceedings consent thereto, or the money or money's worth or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds." In my judgment this provision cannot add anything to the jurisdiction given by the preceding words, but can, at most, only regulate the exercise of the jurisdiction where it exists; and the cases which I have cited as establishing the third proposition are, therefore, unaffected by it. The question in this case does not, in my judgment, arise in the bankruptcy within the meaning of section 102, nor is it necessary to decide it for the purpose of doing complete justice, or making a complete distribution of the property. The trustee does not claim any interest in the property in dispute; and although the decision of this question between *Mr. Beesty* and *Messrs. Glyn & Co.* will determine which of them is to prove in the bankruptcy in respect of the value of these skins, just as the decision of the question in *Ex parte Smith* determined which party was to prove in the bankruptcy for the value of the goods sold by *Hopwood & Co.*, yet, in my judgment, that is not such a question as is referred to in section 102. It might with as much reason be said that if a creditor made a claim upon a surety for the bankrupt, and the surety alleged that he had been discharged by, for instance, time having been given to the bankrupt, the Court of Bankruptcy had authority to decide that question. The result would be to determine whether the creditor or the surety should be the person to prove against the estate of the bankrupt. The motion must be refused, but without prejudice to any action *Mr. Beesty* may be advised to bring against *Messrs. Glyn & Co.*, and, under the circumstances, I think there should be no order as to costs. The official receiver will take his costs out of the estate.

Motion refused without costs.

Solicitors : *Stevens, Bawtree & Stevens* for *Mr. Beesty*.

Murray, Hutchins & Sterling for *Messrs. Glyn, Mills & Co.*

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IN RE
LOWENTHAL,
EX PARTE
BEESTY.

1884.
IN RE
LOWENTHAL,
EX PARTE
BREESTY.

CASES relied upon or referred to :—

- Ellis v. Silber*, L. R., 8 Ch. App. 83; 42 L. J., Ch. 660; 28 L. T. 156.
Ex parte Dickin, In re Pollard, L. R., 8 Ch. Div. 377; 38 L. T. 860.
Ex parte Brown, In re Yates, L. R., 11 Ch. Div. 148; 48 L. J., Bank. 78; 40 L. T. 402.
Ex parte Smith, In re Collie, L. R., 2 Ch. Div. 51; 45 L. J., Bank. 116; 34 L. T. 603.
Ex parte Armitage, In re Learoyd, Wilton & Co., L. R., 17 Ch. Div. 13; 44 L. T. 262.
Ex parte Price, In re Roberts, L. R., 21 Ch. Div. 553; 47 L. T. 402.
Ex parte Lyons, L. R., 1 Ch. Div. 494; 41 L. J., Ch. 41; 26 L. T. 491.
In re Motion, L. R., 9 Ch. App. 192; 43 L. J., Bank. 59; 29 L. T. 757.
Ex parte Pannell, In re England, L. R., 6 Ch. Div. 335; 47 L. J., Bank. 21; 37 L. T. 450.

BEFORE
MR. JUSTICE
CAVE.
1884.
June 10.

IN RE MCALPINE, EX PARTE MCALPINE.

Bankruptcy Act, 1883, Section 170.—Liquidation by Arrangement under the Bankruptcy Act, 1869—Sanction of Court or Registrar—Refusal of County Court Judge to sanction Resolutions.

Held :—That in determining whether it shall give sanction to a composition or liquidation by arrangement entered into under Sections 125 and 126 of the Bankruptcy Act, 1869, in accordance with the provisions of Section 170 of the Bankruptcy Act, 1883, the Court or registrar is not bound by the statement of affairs of the debtor put forward and agreed to by the creditors; but that such Court or registrar is entitled to inquire into the statement for the purpose of seeing whether such composition or liquidation is reasonable and calculated to benefit the general body of creditors.

THIS was an appeal from an order of the learned judge of the Wandsworth County Court, reversing an order of the registrar of that Court, by which sanction had been given to the resolutions of

the creditors of the debtor, *McAlpine*, for liquidation of his affairs by arrangement.

On December 13th, 1883, a petition for the liquidation of his affairs by arrangement was filed by *McAlpine*; and on December 28th the first meeting of creditors was held, when, according to the statement of affairs put forward by the debtor, it appeared that his liabilities amounted to over 17,000*l.*, while the value of the assets were estimated at 1,200*l.*

At the meeting, however, it was resolved that the statement should be accepted, and that the debtor should be discharged; but on the resolutions being submitted to the registrar of Wandsworth County Court, an objection was raised on behalf of one *Goldsmith*, a creditor to the amount of 1,600*l.*, that the resolutions ought not to be accepted, (1) because they were not passed in the interests of the general body of the creditors; and (2) because the statement of affairs put an excessive value on the assets, which, if realized, would show an estate of practically no value.

On March 31st, 1884, notwithstanding these objections, the resolutions were registered by the registrar, with the exception that the debtor was not allowed his discharge.

This order of the registrar was subsequently reversed by the learned County Court judge; and against the decision of the learned judge, reversing the registrar's order, the present appeal was lodged.

Asquith for the appellant:

These proceedings were proceedings under the Bankruptcy Act, 1869; and unless the recent Act of 1883 makes any special provisions to the contrary, they ought to be governed by the Act of 1869. Section 170 of the Bankruptcy Act, 1883, applies without doubt to this case. By that section it is provided that, "after the passing of this Act, no composition or liquidation by arrangement under sections 125 and 126 of the Bankruptcy Act, 1869, shall be entered into or allowed without the sanction of the Court or registrar having jurisdiction in the matter; such sanction shall not be granted unless the composition or liquidation appears to the Court or registrar to be reasonable, and calculated to benefit the general body of creditors." Under the Bankruptcy Act, 1869, the

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statement of affairs must be taken as conclusive after registration ; and I submit that, under section 170 of the new Act, it is the only material which the registrar has to go upon, and that he is not entitled to go behind it.

[CAVE, J. : How can he exercise the discretion given him if that be so?]

The ground of objection may be apparent on the face of the statement.

(Affidavits were then read with regard to the value of the assets disclosed.)

In the case of *In re Webb, Ex parte Walter* (L. R., 2 Ch. Div. 326 ; 45 L. J., Bank. 105 ; 34 L. T. 701), under the Act of 1869, it was decided, that "the meaning of Rule 301 of the Bankruptcy Rules, 1870, is, that on the presentation of a special resolution for liquidation by arrangement to the registrar for registration, the passing of the resolution is conclusive evidence that the debtor's statement of affairs is sufficient ; and the registrar has no power to inquire into the sufficiency of the statement. If, however, it is clear *ex facie* that the statement produced by the debtor is one which the majority of the creditors could not have accepted *bonâ fide* in the interest of the creditors, this may be taken as an objection to the registration of the resolution ; but it cannot be raised after registration. If the statement is a fraudulent one, the proper course for a dissentient creditor to take is to move, after the resolution has been registered, to have the registration vacated. And in *Ex parte Hope, In re Hope* (L. R., 9 Ch. Div. 398 ; 47 L. J., Bank. 78 ; 38 L. T. 762), per JAMES, L. J. : "That the effect of Rule 301 of the Bankruptcy Rules, 1870, is to make the creditors, if they act *bonâ fide*, the sole judges whether the debtor has given sufficient information as to his affairs." These cases certainly tend to show that the registrar and the County Court judge were not entitled to go behind the statement of affairs. At any rate I submit that it lies on the creditor to show conclusively that if the debtor is driven into bankruptcy it will be more advantageous for the general body of the creditors than if the liquidation arrangement was carried out.

Daniel Jones contra :

The Bankruptcy Act, 1883, was specially framed to guard against the many hardships which were found to arise under the Act of 1869. Under the Act of 1869 the creditors were completely masters of the situation, and the result of this was anything but satisfactory. In this case the statement of affairs is altogether misleading. The creditors will only get about $2\frac{1}{2}d.$ in the pound if the liquidation is allowed. There are several cases which show that it has always been considered a wrong course of procedure to pass resolutions for liquidation where the assets are trifling, as they certainly are in this case. In *Ex parte Aaronson, In re Aaronson* (L. R., 7 Ch. Div. 713; 47 L. J., Bank. 60; 38 L. T. 343), the Court of Appeal decided that "a debtor who has practically no assets distributable among his creditors is not entitled to file a liquidation petition;" and, further, "that resolutions for a liquidation by arrangement passed under such circumstances ought not to be registered, even though they do not include a discharge to the debtor." I would also refer to the case of *In re Staff* (L. R., 20 Eq. 775; 44 L. J., Bank. 137; 32 L. T., N. S. 40), and to the case of *Ex parte Ball* (L. R., 20 Ch. Div. 670; 51 L. J., Ch. 911; 47 L. T., N. S. 213), to the same effect.

Asquith in reply.

CAVE, J.:

This is an appeal from a decision of the judge of the Wandsworth County Court, by which he reversed a decision of the registrar of the same Court sanctioning certain resolutions for the liquidation of the affairs of the debtor by arrangement. Section 170 of the Bankruptcy Act, 1883, rendered this sanction necessary, and it is there provided that "such sanction shall not be granted unless the composition or liquidation appears to the Court or registrar to be reasonable and calculated to benefit the general body of creditors." Under the Bankruptcy Act, 1869, a very large discretion was allowed to the creditors in such circumstances. It is generally acknowledged, however, that the working of the old Act in matters of this kind was anything but satisfactory, and to guard against the evils which were found to prevail the provi-

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sions contained in section 170 of the new Act were inserted, to come into operation on the passing of that Act. Dealing with the objection which has been raised that the registrar was bound by the statement of affairs, I am clearly of opinion that it cannot be maintained. I fail to see how it is possible for the registrar to exercise his discretion without knowing the exact condition of the estate. It was urged that under the liquidation the creditors will get all they could obtain by bankruptcy proceedings. I do not think this is a sufficient answer; for by section 170 quite a different complexion is put on the circumstances. I am of opinion that the County Court judge, in thinking that it was his duty to inquire into the statement of affairs, was perfectly right. Further, looking at the statement itself, I must say that there is every indication that the creditors were friendly to the debtor, and that it was meant to delude the Court into the belief that there was a substantial estate. I am always unwilling to overrule a County Court judge unless I am sure that he is wrong. In the present case I am quite sure that the County Court judge was right, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Wells* for the appellant.

S. F. Taylor for the respondent.

CASES relied upon or referred to :—

In re Webb, Ex parte Walter, L. R., 2 Ch. Div. 326; 45 L. J., Bank. 105; 34 L. T. 701.

Ex parte Hope, In re Hope, L. R., 9 Ch. Div. 598; 47 L. J., Bank. 78; 38 L. T. 762.

Ex parte Aaronson, In re Aaronson, L. R., 7 Ch. Div. 713; 47 L. J., Bank. 60; 38 L. T. 343.

Ex parte Staff, In re Staff, L. R., 20 Eq. 775; 44 L. J., Bank. 137; 32 L. T. 40.

Ex parte Ball, L. R., 20 Ch. Div. 670; 51 L. J., Ch. 911; 47 L. T. 213.

IN RE W. AND J. LUDFORD.

BEFORE
MR. JUSTICE
CLAVE.
1884.
June 11.

Bankruptcy Act, 1883, Section 97 and Section 46.—Special Case—"Costs of Execution"—Poundage.

Held:—That the meaning to be attached to the words "costs of the execution" in Sub-section (1) of Section 46 of the Bankruptcy Act, 1883, is different to the meaning to be attached to the same words in Sub-section (2) of the same Section. Under the words "costs of the execution" in Sub-section (1) the sheriff is not entitled to "poundage."

THIS was a special case stated by the learned judge of the Birmingham County Court under section 97 of the Bankruptcy Act, 1883.

Section 97 (3) provides, that "if any question of law arises in any bankruptcy proceeding in a County Court which all the parties to the proceeding desire, or which one of them and the judge of the County Court may desire, to have determined in the first instance in the High Court, the judge shall state the facts in the form of a special case, for the opinion of the High Court. The special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination."

The facts of the present case were as follows:—

On January 17th the sheriff of Warwickshire (in the present case called the respondent) levied on the goods of the debtors by virtue of a writ of *fi. fa.* bearing date the preceding day.

On January 20th a petition in bankruptcy was filed by the debtors; and on January 21st the sheriff delivered possession of the goods seized to the official receiver in accordance with the provisions of section 46 of the Bankruptcy Act, 1883.

The question for the opinion of the Court was whether the sheriff was entitled to the sum of 4*l.* 12*s.* 5*d.* for poundage or not.

The case was stated by the official receiver (herein appearing as the appellant) with the consent of the sheriff.

1884. *M. D. Chalmers* for the official receiver :

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The question turns upon the meaning of the words "costs of the execution" in section 46. These words are used both in sub-section (1) and sub-section (2) of that section. But I submit that the meaning to be placed upon them in the two sub-sections is not the same. They are used in different senses in each sub-section. Sub-section (1) deals with cases "where the goods of a debtor are taken in execution and before the sale thereof," &c. There is no sale. Poundage does not become due until there has been a sale. It is of the nature of payment by results. In *Miles v. Harris* (L. R., 12 C. B., N. S. 550), it was decided that "the sheriff is not entitled to poundage where, after seizure and before sale, the judgment and all subsequent proceedings are set aside for irregularity." In *Mortimore v. Cragg* (L. R., 3 C. P. Div. 216; 47 L. J., C. P. 348; 38 L. T. 116), it appears that "a sheriff, who by compulsion of a writ of *fi. fa.*, recovers the amount of a judgment debt, is entitled to poundage, although after seizure he is paid out by the execution debtor without a sale of any portion of the goods seized." In that case the sheriff recovered the amount. Also in *In re Craycraft, Ex parte Brouning* (L. R., 8 Ch. Div. 596; 47 L. J., Bank. 96; 38 L. T. 364), it was held that "the facts of there having been no sale, and the liquidation of the debtor, did not affect the right of the sheriff to be paid by the trustee the necessary expenses of possession and of preparing for sale." Nothing is said as to poundage.

E. Cooper Willis, Q.C. (Macaskie with him), for the respondent :

In ordinary cases I admit that if poundage is to be payable, the execution must bear some fruit. Under the new Act, however, I contend the position of the sheriff is improved. In sub-section (2) of section 46, it is admitted that the words "costs of the execution" include poundage. That is where a sale has taken place. The question is whether the words "costs of the execution" are used in the same or in a different sense in two sub-sections, one immediately following the other.

[CAVE, J. : Why should the sheriff be in a better position, in the present case, than when the writ is set aside for irregularity ? On what scale ought the poundage to be ascertained ?]

There is no difficulty as to that in this case. Further, I submit that the words "costs of the execution" have been explained in the case of *Armitage v. Jessop* (L. R., 2 C. P. 12), where it was held that "a plaintiff who recovers a debt not exceeding 20*l.*, although deprived of costs by force of the County Courts Acts, is nevertheless entitled to levy poundage fees and expenses of execution in addition to the sum recovered, under the 123rd section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76)." Here poundage is included.

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Macaskie followed.

CAVE, J.:

In this case I am of opinion that the argument put forward on behalf of the official receiver must prevail. As a general proposition of law it is beyond question that the execution must be of some value, and bear some fruit if poundage is to be payable. In other words, the sheriff is entitled to poundage only where he has obtained the money and can hand it over to the execution creditor. The sheriff may have got the money either by sale or by the debtor paying the sum due, and in either case he would be entitled to poundage. But I am of opinion—and I know of no case, and none has been quoted to me, to alter my opinion—that until affairs are in that position the sheriff is not entitled to poundage. Section 46, sub-section (1), says, "Where the goods of a debtor are taken in execution, and before the sale thereof, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall on request deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge."

The meaning is plain, that if a notice of a receiving order having been made is served on the sheriff before sale he is not entitled to poundage; while by sub-section (2), where the goods are sold and the sheriff has realised the money by the sale, he is entitled to poundage. Mr. *Willis* urged that the intention of the new Act was to improve the position of the sheriff. Doubtless this is so,

1884. and it is done by sub-section (2). To my mind, also, a valid
 IN RE W. AND reason is afforded for the distinction in the fact that where the
 J. LUDFORD. goods are actually sold, the amount of the poundage can be readily
 ascertained. Where goods are not sold in many cases there would
 be much difficulty in ascertaining this. The intention of the
 legislature is clearly that under sub-section (1), where the goods
 are not sold, poundage is not payable; and under sub-section (2),
 where the goods are sold, the sheriff shall be entitled to poundage.
 Now as to the costs——

M. D. Chalmers :

I may tell your Lordship that the present is a test case, and the
 official receiver does not press for costs.

Solicitors: *The Solicitor to the Board of Trade* for the official
 receiver.

Taylor, Hoare & Co. for the sheriff.

CASES relied upon or referred to:—

Miles v. Harris, L. R., 12 C. B., N. S. 550.

Mortimore v. Cragg, L. R., 3 C. P. 216; 47 L. J., C. P.
 348; 38 L. T. 116.

In re Craycraft, Ex parte Browning, L. R., 8 Ch. Div. 596;
 47 L. J., Bank. 96; 38 L. T. 364.

Armitage v. Jessop, L. R., 2 C. P. 12.

PRACTICE.

IN RE J. PEARCE, EX PARTE THE BOARD OF TRADE.

BEFORE
MR. JUSTICE
CAVE.
1884.
June 11.

Bankruptcy Rules, 1883, Rule 78—Application for Substituted Service of Notice of Motion to commit.

THIS was an *ex parte* application on behalf of the Board of Trade for leave to have substituted service of a notice of motion to commit one *H. Brett*, a trustee in the bankruptcy of *J. Pearce*.

On April 7th an order was made by the Court directing *H. Brett* and *H. A. Dubois*, as such trustees in the bankruptcy of *Pearce*, to pay into the Bankruptcy Estates Account at the Bank of England, within fourteen days, the sum of £158:12s. 9d., undistributed funds and dividends remaining in their hands, in accordance with the provisions of section 162 of the Bankruptcy Act, 1883. (See *ante*, p. 56.)

On May 26th, the case was again before the Court, and adjourned in order that personal service of the notice of motion might be proved by affidavit. (See *ante*, p. 111.)

It having been found impossible, as asserted by the Board of Trade, to effect personal service in the case of *Brett*, leave for substituted service was now asked.

M. D. Chalmers for the Board of Trade:

Rule 78 of the Bankruptcy Rules, 1883, provides, with regard to applications to commit, that "subject to the provision of section 102 of the Act, upon the filing of such application, the registrar shall fix a time and place for the Court to hear the application, and shall issue a notice to be served by an officer or high bailiff of the Court personally on the person sought to be committed three days at least before the day of hearing the application, unless the Court shall, by order upon good cause shown, direct service of the notice to be made in some other manner, in which case it shall be served, together with a copy of the order, in the manner so directed." Provided that I can satisfy

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IN RE
J. PEARCE,
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OF TRADE.

your Lordship that it is impossible to effect personal service, I submit that on the terms of this Rule 78, I am entitled to an order directing substituted service.

[CAVE, J. : There is no doubt that in such a case I could order substituted service.]

Counsel then read (1) an affidavit of one *Gillett*, describing himself as a clerk in the employment of the Board of Trade, in which it was stated that he had on several occasions been to the office of *Brett* and failed to find him : that no one was there but a clerk, who said he did not know where *Brett* was, but he believed that he was at present in Paris : that he had also seen a housekeeper, who refused to give *Brett's* address. (2) An affidavit of one *Crouchurst*, which stated that *Brett* was in Court, on April 7th, at the time when the order for payment was made.

CAVE, J. :

It appears to me that the words in the first affidavit "refused to give me his address" are somewhat ambiguous. The housekeeper might not know the address. The words at any rate are consistent with ignorance. Before I give leave for substituted service I must be satisfied that a man knows that an attempt is being made to effect service, and is intentionally keeping out of the way. There is a presumption that this is so in the present case, but there seems to have been no inquiry made at his place of residence. The man's residence might doubtless be found without much trouble, and inquiry should be made there. I am not satisfied at present that it is a case where leave for substituted service should be given.

Motion adjourned.

Solicitor : *The Solicitor to the Board of Trade.*



IN RE MITCHELL, EX PARTE CUNNINGHAM.

Bankruptcy Act, 1883, Section 6, Sub-section 1(d)—Domicil of Debtor—Officer in British Army serving out of England.

COURT OF
APPEAL.

BEFORE
BAGGALLAY,
L. J.,
COTTON, L. J.,
LINDLEY, L. J.
1884.
June 13.

Held: (1) That Section 6, Sub-section 1 (d) of the Bankruptcy Act, 1883, which provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor, unless such "debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England" must be taken to mean domiciled in England as distinguished from Scotland or Ireland.

(2) That the onus of proof of the domicil is, in the first instance, on the creditor presenting the petition.

(3) That it is not sufficient, in order to throw the onus of proof on the other side, for the petitioning creditor to show that the debtor is an officer in the British Army on active service out of England, and belongs to a regiment the head-quarters of which are in England, and bears an English name.

(4) A Scotchman or an Irishman does not lose his domicil of origin by accepting a commission in the English army. (*Yelverton's Case*, 29 L. J., P. & M. 34, followed.)

THIS was an appeal from a decision of Mr. Registrar *Hazlitt* dismissing a bankruptcy petition presented by *Cunningham* against the debtor *Mitchell*.

The debtor is a lieutenant-colonel in the Engineers, at Guernsey, and in command of the Guernsey district, against whom a judgment for a sum amounting, with costs, to 185*l.* had been obtained.

This sum not having been paid, application was made for a bankruptcy notice on January 2nd last, and leave to serve such bankruptcy notice in Guernsey was granted by Mr. Registrar *Pepys*, the time limited for the debtor to respond being fourteen days after service upon him.

This bankruptcy notice, it was alleged, was duly served by one *Mesurier*, and the time limited under it expired on February 2nd. No notice being taken of it by Colonel *Mitchell*, a creditor's peti-

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IN RE
MITCHELL,
EX PARTE
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tion by *Cunningham* was presented on March 7th, describing the debtor as of Fort George, Guernsey, and was supported by affidavits of *Cunningham* and Mr. *Kiell*, his solicitor, stating that the debtor was lieutenant-colonel in the Engineers, and was, to the best of their knowledge and belief, domiciled in England; that the head-quarters of the Royal Engineers was at Chatham; and that the debtor resided at Glendower Mansions, South Kensington. This petition was also, as was alleged, served by *Mesurier*, sixteen days being allowed by the debtor to respond.

A short time before the hearing, however, a letter was received from *Lewis & Lewis*, the debtor's solicitors, stating that "no bankruptcy notice or petition had been served on Colonel Mitchell," and the hearing was in consequence adjourned from April 4th to May 2nd, for the purpose of a further affidavit being made by *Mesurier* as to the way in which he had effected personal service. This affidavit had been answered by *Mitchell*, on April 29th.

The hearing of the petition came on before Mr. Registrar *Hazlitt* on May 2nd, and two points were raised by Messrs. *Lewis & Lewis* on behalf of the debtor, the first dealing with the question of personal service, the second that the debtor did not come within the provisions of section 6, sub-section 1 (d), of the Bankruptcy Act, 1883.

The petition was dismissed, and the creditor now appealed.

Lyon for the appellant :

The real point in dispute is under section 6, sub-section 1 (d), of the Bankruptcy Act, 1883. That section says that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless "the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England." I submit that Colonel *Mitchell* was domiciled in England. A Scotch officer entering the English army acquires an English domicile. He might perhaps retain his first domicile for some purposes.

[BAGGALLAY, L. J.: A man cannot have two domicils. That theory is exploded.]

I would call your Lordships' attention to the case of *Brown v. Smith* (15 Beav. 444), and also to *Forbes v. Forbes* (23 L. J., C. 724), where the decision was, that "by an engagement to serve, and actual service in India under a commission in the Indian army, a person who had by origin a Scotch domicile acquired an Indian or Anglo-Indian domicile in the place of his domicile by origin, and that although he had real estate in Scotland."

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[COTTON, L. J.: No doubt thirty years ago there were many conflicting cases.]

[BAGGALLAY, L. J.: In *Yelverton's Case* (*Yelverton v. Yelverton*, 29 L. J., P. & M. 34), it was decided that "an Irishman who never resides in England does not, by enlisting in a regiment the head-quarters of which are in England, acquire an English domicile, so as to make him subject to the jurisdiction." (In that case the head-note is: "*Y.*, whose domicile of origin was Ireland, came over to England when a minor for the purpose of receiving a military education; obtained a commission in the Royal Artillery, and was afterwards stationed in Scotland. The head-quarters of the Royal Artillery have always been in England. *Y.* subsequently married in Scotland *L.*, whose domicile of origin was England, and was afterwards re-married to her in Ireland according to the rites of the Roman Catholic Church. The parties cohabited together at various places in Scotland, England and France until April, 1858, when *Y.* deserted *L.* in France, and returned to Scotland, where he had since remained, refusing to cohabit with *L.*, and subsequently in Scotland re-married another woman. Held, in a suit by *L.* for restitution of conjugal rights, that as *Y.* was a foreigner by origin, had never acquired an English domicile, and had never resided in England, except temporarily, and was not in England at the commencement of the suit, that he was not subject to the jurisdiction of the Court.) Your theory is that by Colonel Mitchell entering the Engineers, the head-quarters of which is at Chatham, he acquired an English domicile. The decision in *Yelverton's Case* is that he "had never acquired an English domicile."]

I submit that the domicile of origin remains to this extent; if a man resigns service in another army his domicile of origin reverts.

[COTTON, L. J.: A man does not abandon his domicile without changing his residence.]

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[LINDLEY, L. J.: Can you show us that *Yelverton's Case* is overruled? if not, it seems certainly against you.]

Counsel also referred to the cases of *Hodgson v. Beauchesne*, 12 Moo. P. C. Cas. 285; *Somerville v. Somerville*, 5 Ves. 749; and the case of *Sir Charles Douglas (Ommaney v. Bingham)*, before the House of Lords, March 18th, 1796, therein cited.

[COTTON, L. J.: If you have any case by which you can show that a Scotchman entering the English army loses his domicile in Scotland, we shall be glad to hear it.]

Further, I submit that Colonel *Mitchell*, being an officer in the British army, must *prima facie* be regarded to be English. All that Colonel *Mitchell* says in his affidavit is, "I have been in the Engineers since 1855, and have resided in Guernsey as commandant of the district since 1881. I was not resident, nor have I within a year before the petition was presented had a residence, in England. I temporarily stayed at an hotel in Glendower Mansions, South Kensington." I also submit that in section 6, sub-section 1 (d), the word "ordinarily" goes with "resided" only; the words "had a dwelling-house" would catch temporary residence.

[COTTON, L. J.: The evidence is that it is an hotel; a man who comes up to town for a month cannot be caught.]

Sidney Woolf, for the debtor, was not called upon.

BAGGALLAY, L. J.:

This is an appeal from a decision of Mr. Registrar *Hazlitt*, dismissing a bankruptcy petition presented against Colonel *Mitchell* the debtor. To the petition there were two grounds of objection. First, that personal service had not been effected. It is not necessary to say more of this now. If the other objection had not been maintained, I think it would have been necessary to hear more on this point, as I think the evidence was incomplete. The second objection was founded on section 6, sub-section 1 (d), of the Bankruptcy Act, 1883, which says that a creditor shall not be entitled to present a petition unless "the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place

of business in England." It appears to me that it has not been established that the debtor within a year has "ordinarily resided or had a dwelling-house or place of business." But the question remains, Is the debtor domiciled in England? It is for the person petitioning to show this. All we learn is that the debtor bore a name of the subject of the Queen, and also *prima facie* held a commission in the English army. He might do that without being domiciled in England. He might be a Scotchman or Irishman, and in either case would come within the domicile question. Now it was argued that the mere fact of serving the Queen gives him a domicile in England although his domicile of origin was Scotch or Irish. It appears to me that the rules of service may be laid down under three heads: (1) A subject of the Queen entering the military or naval service of a foreign power acquires the domicile of the foreign power: (2) A subject of the Queen, Scotch or Irish, entering our own service of the Queen, and then he would not lose his domicile of origin: (3) Anomalous cases arising under the old East India Company, which would not now arise. No doubt these cases are anomalous. I am of opinion that the second of the above rules is applicable to the present case. Whatever was his original domicile he was a subject of the Queen; when he entered the service he did not abandon that domicile. Upon that ground I think that the decision of the registrar was right. *Hodgson v. Beauchesne* was a most peculiar case. I am of opinion that the appeal must be dismissed.

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COTTON, L. J.:

I entirely agree with the view just expressed. The point turns on section 6, sub-section 1 (d). It is not suggested that the debtor "ordinarily resided" in England. It is suggested that he had "a dwelling place." It turns out to be an hotel. A man might perhaps ordinarily reside at an hotel, but merely coming up to an hotel temporarily would not have this effect. Then with regard to the question of domicile. I am of opinion that the onus of proof is on the petitioner. Domiciled in England means as distinct from Scotland or Ireland, as well as from other countries. The term England is sometimes used not so strictly, but in my

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opinion it is used strictly here. It is suggested that the debtor, being in the Engineers, the head-quarters of which is at Chatham, would make an English domicil. That is erroneous. Here there is no evidence of any residence of the debtor in England. All we know is that he has a commission in the English army, and is performing his duties in the Channel Islands. It is a mistake to say that a Scotchman accepting a commission in the English army changes his domicil. The matter was decided in *Yelverton v. Yelverton* and other cases. I am clearly of opinion that the registrar was right.

LINDLEY, L. J. :

I am of the same opinion. It is clear that Colonel *Mitchell* had not "ordinarily resided or had a dwelling-house or place of business in England." But it is said he was "domiciled in England." The first question I will deal with is the burden of proof. I think that is on the petitioner. Another question is whether a Scotchman or an Irishman by entering the English army becomes English in respect of domicil. It is an entire mistake to suppose so. The question was clearly established in *Yelverton's Case* and other cases. The old cases of Anglo-Indian domicil are anomolous and exceptional: they only served to confuse the English law of domicil. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *E. R. Kiell* for the appellant.

Lewis & Lewis for the respondent.

CASES relied upon and referred to:—

Brown v. Smith, 15 Beav. 444.

Forbes v. Forbes, 23 L. J., C. 724.

Yelverton v. Yelverton, 29 L. J., P. & M. 34.

Hodgson v. Beauchesne, 12 Moo. P. C. Cas. 285.

Somerville v. Somerville, 5 Ves. 749.

IN RE CLARKE AND ANOTHER, EX PARTE CLARKE AND ANOTHER.

COURT OF
APPEAL.

Bankruptcy Act, 1883, Section 18—Scheme of Arrangement—Discharge of the Debtors left to the Discretion of the Committee of Inspection—Refusal of Court to approve Scheme.

BEFORE
BAGGALLAY,
L. J.,
COTTON, L. J.,
LINDLEY, L. J.

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June 13.

In a case where a scheme of arrangement of the debtor's affairs, duly agreed to and confirmed by the creditors in accordance with the provisions of Section 18 of the Bankruptcy Act, 1883, contained a clause to the effect that "the debtors shall be discharged when the committee of inspection so resolve,"

Held: That such provision dealing with the discharge of the debtors was unreasonable, and not in accordance with the intention and scope of the Act; and that a scheme containing such a provision ought not to be approved by the Court, even though the debtors themselves asked that such approval should be given.

THIS was an appeal from a decision of Mr. Registrar *Murray* refusing to approve a scheme of arrangement in respect of the affairs of the debtors, *C. and G. Clarke*.

The case raised a question of considerable importance with regard to schemes of arrangement as allowed by the Bankruptcy Act, 1883, in lieu of bankruptcy.

The debtors, *Clarissa* and *George Clarke*, were bookbinders carrying on business in Friar Street, Doctors' Commons, under the title of *Westleys & Co.*, and had recently presented a bankruptcy petition.

At the first meeting of creditors resolutions were passed which provided that the estate should vest in a trustee thereby appointed, and that the business should be carried on under the direction of a committee of inspection consisting of three creditors, with full powers of sale. It was also resolved that the debtors should give every assistance to the creditors in realizing the property and in carrying on the business, and by paragraph (9) of the scheme, "that the debtors shall be discharged when the committee of inspection so resolve."

This scheme was unanimously accepted by the creditors, and con-

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firmed at a subsequent meeting, as required by section 18, sub-section (2), of the Bankruptcy Act, 1883, and application was made to the Court for its approval.

In the report of the official receiver, which was then read, however, it was stated that, having regard to section 28 of the Act, he had no reason to believe that the debtors had committed any misdemeanour under the Act, or under Part 2 of the Debtors Act, 1869, and that nothing had come to his knowledge which could lead him to believe that the debtors had committed any of the offences referred to in sub-section (3) of section 28 of the Bankruptcy Act, 1883.

At the same time the official receiver pointed out that by paragraph (9) of the scheme the debtors were only to be discharged "when the committee of inspection so resolve;" and he further submitted to the Court that, under the provisions of the Bankruptcy Act, 1883, the creditors had no power to suspend or grant the discharge of the debtor, and that the power was one which ought not to be conferred on the committee of inspection.

The learned registrar, after adjourning the matter for a week for consideration, delivered judgment on May 28th last, in which, after pointing out the fact that "if the Court should come to the conclusion that such a resolution was beyond the power of the creditors to pass, then, however beneficial to the creditors the scheme might be in other respects, the Court would not be at liberty to alter the substance of it by eliminating the objectionable clause, but would have to refuse its sanction to the scheme in its entirety as provided by Rule 162 of the Bankruptcy Rules, 1883." He went on to say, "that on the approval of the composition or scheme, which is in effect a substitution for bankruptcy, the debtor gets what is equivalent to a discharge in case he had been adjudicated a bankrupt."

On the grounds, therefore, that such approval by the Court of a scheme of arrangement under section 18 of the Bankruptcy Act had the effect of giving an equivalent to a discharge to the debtor, and that in this particular case the creditors had taken upon themselves to suspend the discharge, the resolution was *ultra vires*, and the scheme could not be confirmed.

From this decision the debtors now appealed.

Sidney Woolf for the appellants debtors.

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These resolutions were unanimously passed and were confirmed as required. When application for the approval of the Court was asked for, the usual report of the official receiver was read in accordance with sub-section (5) of section 18 of the new Act. That report was altogether favourable; there was no misconduct on the part of the debtors; but the official receiver called attention to par. (9) of the proposed scheme, by which the discharge of the debtors is only to be given "when the committee of inspection so resolve:" and on the ground that this clause was *ultra vires* the registrar refused approval. I submit that there is nothing in the Act to prevent a creditor and a debtor from entering into an arrangement of this kind which gives power over future assets. Section 18 of the Bankruptcy Act, 1883, is very general in its terms—sub-section (1) speaks of a scheme of arrangement; but there is nothing in the Act to say what the scheme may or may not contain. It is true that sub-section (6) of section 18 says: "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme." But it is ridiculous to suppose that a scheme which provides for present and future assets is "not calculated to benefit the general body of creditors." The discretion given to the Court is a judicial discretion. Under sub-section (6), the question is, whether by the Act there is anything to prevent the creditors agreeing with the debtor that, instead of their adjudicating him a bankrupt, he will make over on their behalf to a trustee all his present and all his future property until such time as the creditors shall agree. If the debtors objected to the suspension of their discharge it might be different, but in a case like the present I am at a loss to understand what the objection can be.

[BAGGALLAY, L. J.: The point seems to be that the paragraph
M.B. L

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ANOTHER.

The Court has nothing to do with it. There is no bankruptcy. If so, section 28 would apply, and then discharge would come in.

[COTTON, L. J. : I do not know whether, if the creditors do not make up their minds to take the property and give the discharge, the matter must not go into bankruptcy.]

The section does not say so specifically. All that this resolution provides is that the release shall be at a date subsequent to the approval of the Court.

[COTTON, L. J. : Is there any provision that the creditors could call a meeting at a future time in order to give the release, at any rate so as to bind absent and dissentient creditors ?]

I submit so. The object is that the after-acquired property may vest in the trustee. The Court has no power over the discharge of a debtor in case of a composition.

[COTTON, L. J. : The principle of the decision appealed against is, that if there is to be a discretion as to discharge in the future, that must be in the Court, and not in the creditors, and it must be in a bankruptcy.]

The words of section 18, sub-section 1, are the widest. If once limits are to be introduced, it will be most objectionable and dangerous. In this case the members of the committee of inspection were persons well qualified to form a proper judgment : they were not friends of the debtors. I submit that there is nothing in the Act to prevent an arrangement of this kind being made.

Bigham, Q.C. (M. D. Chalmers with him), for the official receiver :

My proposition is that the new Act meant that there should be two ways in which a man could get his discharge (1) bankruptcy, or (2) a scheme approved by the Court ; and as soon as a scheme is approved he gets his discharge. It was never intended that the power of the Court over discharge should be removed to an irresponsible body : that would be holding a rod over a man for the

whole of his life. By the Act, section 4 deals with acts of bankruptcy; section 5 deals with the making of the receiving order; then follows the meeting of creditors by section 15, and the public examination of the debtor by section 17; while section 18 provides how a composition or scheme is to be carried out. My contention is that section 18 provides that the acceptance of a scheme puts an end to the creditors' right, and makes the debtor a free man, except that by sub-section 6, the Court may refuse to approve it. There are two ways in which a debtor may become free (1) bankruptcy, (2) a composition or scheme, which is much quicker; the Court in each case has to say when the discharge shall be granted; if a clause like paragraph 9 is sanctioned, these schemes will be always used: these "lame ducks" will be going about unable to trade or to be traded with, and having the creditor's hand over them. The Act never contemplated that the jurisdiction of the Court should be placed in the hands of irresponsible persons. The approval of the composition or the scheme is the discharge. Discharge applies altogether to bankruptcy. There can be no discharge properly so-called in the case of a scheme. The approval is the discharge. Section 28 points out what is to be considered before discharge in bankruptcy; section 18 says in terms to the Court, Before you approve a scheme the same things must be considered. Discharge in bankruptcy equals approval in the case of a scheme: both are by the Court.

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M. D. Chalmers followed.

Sidney Woolf in reply.

BAGGALLAY, L. J. :

The scheme of arrangement in question comprised some ten or twelve paragraphs; but it is unnecessary to refer to the details of these. It is only material to state that by paragraph 9, after stating that the debtors shall give their aid in realizing the property, and in carrying on the business, it is provided that the debtors "shall receive their discharge when the committee of inspection so resolve." In section 18 of the Bankruptcy Act, 1883, there is no reference to any order of discharge of a debtor

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AND ANOTHER,
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ANOTHER.** in the case of a composition or scheme of arrangement. The provisions as to the order of discharge are contained in section 28, and those relate to bankruptcy. It is true that in section 18, sub-section 13, it is provided, that "Part 3 of this Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words 'trustee,' 'bankruptcy,' 'bankrupt,' and 'order of adjudication,'" as if those terms included a trustee under a composition or scheme of arrangement, a compounding or arranging debtor, and an order approving the composition or scheme. But the only section in which discharge appears to have been in the contemplation of the legislature with reference to section 18 is section 44 of the Act. That section deals with the description of a bankrupt's property divisible amongst his creditors; and reading it by the aid of sub-section 13 of section 18, in the case of a scheme of arrangement, the words "the date of the order approving the scheme" would have to be inserted. The effect of that is, that property accruing to the debtor before that period would be distributable among the creditors; and in that sense it would appear that discharge was in the contemplation of the legislature. Then what do we find as to the effect of the approval of the scheme by the Court? Sub-section 8 of section 18 provides, that "A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy." And, by Rule 163, "When a composition or scheme is sanctioned, the official receiver shall forthwith put the debtor (or, as the case may be, the trustee under the composition or scheme) into possession of the debtor's property. The Court shall also rescind the receiving order." It is very important, therefore, for the Court to consider what are the terms of the scheme before it sanctions it. Here there was no objection, but the question of the release to be given to the debtors by the committee of inspection. I am not prepared to say what would be the effect if the scheme contained no provision as to the time of the discharge; but I am inclined to think that the approval of the Court would be equivalent to the discharge of the debtor. I also give no decided opinion as to the effect if a fixed period had been appointed for the discharge. Such a provision

does not appear to my mind unreasonable. But we have got a case here where the discharge is simply left to the discretion of the committee of inspection. That provision, I am of opinion, is an unreasonable one, and the registrar was right in refusing to sanction the scheme which contained it.

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IN RE CLARKE
AND ANOTHER,
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COTTON, L. J. :

I am of the same opinion. The question is whether this scheme is reasonable or not reasonable. I am of opinion that no scheme can be reasonable which is contrary to the intention of the Act. The objection to the present scheme is, that the discharge of the debtors is left to the discretion of the committee of inspection. It is said that that provision is inserted only for the purpose of bringing in after-acquired property. We have not to decide that. I express no opinion as to whether a clause might be inserted in a scheme dealing with after-acquired property. That is not in question in this case. Here under the scheme there may never be any discharge of the debtors at all, if the committee of inspection refuse to grant a discharge. Is a scheme, containing a provision of this kind, in accordance with the provisions of section 18? In my opinion, No. It is contrary to the Act and with section 18, which gives to the creditors the option and power to accept a scheme of arrangement; and then this scheme must be approved by the Court.

LINDLEY, L. J. :

I am also of opinion that this scheme is one which should not be approved. I confess that I am much embarrassed on the reading of clause (9) of the scheme. I am clearly of opinion, however, that it is not consistent with the general scope of section 18.

Appeal dismissed, with costs out of the estate.

Solicitors : *Gush, Phillips & Walters* for the appellants.
W. W. Aldridge for the official receiver.



BEFORE
MR. JUSTICE
CAVE.
IN CHAMBERS.

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June 14.

IN RE CARVILL AND MCKEAN.

Action in connection with Bankruptcy.

Application for Particulars; Discovery; Leave to deliver Interrogatories; and that the Action might be tried by a Jury.

THIS was an application on behalf of the defendant in an action pending in connection with the bankruptcy of *Carvill* and *McKean*, for an order directing (1) that particulars of the ground of the claim of the trustee in the bankruptcy (the plaintiff in the action) might be given; (2) for discovery and for leave to deliver interrogatories; (3) that the action might be tried by a jury.

The facts were as follows:—

A short time before the filing of the petition an order was given by the bankrupts to one *Maconokie* for a large supply of fish to be sent abroad. A few days after this order the bankrupts stopped payment, and the petition was subsequently filed. Hearing that *Carvill* and *McKean* were in difficulties, however, *Maconokie* executed a stoppage *in transitu* of the goods on board the ship in which they then were, but an agreement was afterwards arrived at by which it was determined that the goods should go on to their destination, and that the money received from the sale should be paid into the bank. This was done, and 375*l.* had been paid into Court. The issue in the action was whether the trustee or *Maconokie* was entitled to this money.

McColl for *Maconokie*, the defendant in the action, asked for an order as previously stated.

Thompson, contra:

The bankruptcy is a bankruptcy under the old Act of 1869. This is an application under the old Act. An application was formerly made to Mr. Registrar *Murray*, and the objection was then raised that he had no jurisdiction. The Court of Appeal

subsequently ordered that it should be remitted to the registrar, and it was finally agreed that it should be tried before your Lordship. I imagine that it will be tried under the old practice.

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IN RE CARVILLE
AND MCKEAN.

CAVE, J.:

The old law may prevail; old practice never. With regard to the first question as to particulars. I must say I think it very dangerous for one party to refuse to give particulars. The object of such refusal is manifest; and if they are not given, and prove to be necessary, I should simply adjourn the case, and compel the party refusing to pay the costs. [An arrangement was come to by which it was agreed that the trustee should not give further particulars, he undertaking to be bound by the facts stated in an affidavit sworn August 4th, 1883.] Now, as to the question of discovery and interrogatories, I think that the trustee should make an affidavit of documents, and that the defendant in the action should be allowed to deliver interrogatories, if advised to do so, within seven days after the affidavit; the trustee to have ten days to answer the interrogatories—the defendant of course making the deposit required by the High Court Rules of 1883. Now as to the question of the trial by a jury, I suppose there is no objection.

Thompson :

I do object strongly. I submit that it is entirely a matter for your Lordship's discretion. I submit that it would be altogether inadvisable to have a jury in this case. I should say it is not a question of fact to be tried; and a jury would be an unnecessary expense.

CAVE, J.:

If the Bankruptcy Act had not passed, the case would have been tried in the High Court. In that event the defendant would have had a jury by right. It is not intended that I should take away the right of having a jury except in special circumstances—as, for example, that it is solely a point of law or what not. In questions of disputed fact, I am clearly of opinion a jury should be called in. The learned judge who presided over the Bankruptcy

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AND MCKEAN. Court under the old Act was naturally, perhaps, unwilling to seek the aid of a jury, but I preside over this Court now, and I come from the other side of Westminster Hall, as it is said, and I fully appreciate a jury. I generally find they manage to do right. If, as is alleged on one side here, that in this case there was a verbal contract, and there is some dispute as to its terms, that is surely a case for a jury. Even if, as you say, there was a written contract, and the point is solely one of law, there can be no harm in a jury being present. I shall direct them what verdict they must find. There will be an order for a jury, and all costs will be reserved with liberty to apply.

Solicitors: *Harries, Wilkinson & Raikes* for the applicant.

Robins, Cameron & Kenn for the trustee in the bankruptcy.

IN RE G. PRICE.

Bankruptcy Act, 1883, Section 55—Disclaimer of Lease by Trustee—Extension of Time.

BEFORE
MR. JUSTICE
CAVE.

1884.

June 16.

Application by Trustee for Extension of Time in which to Disclaim : the Application being made after the Time allowed by the Act for Disclaiming had expired.

THIS was an application by the trustee in the bankruptcy of *G. Price*, under section 55 of the Bankruptcy Act, 1883, for an order to extend the time allowed by section 55, sub-section (1), within which such trustee may exercise his right to disclaim a certain lease held by a bankrupt.

Section 55, sub-section (1), provides that “where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell, or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within *three months* after the first appointment of a trustee, disclaim the property.”

In the present case the trustee in the bankruptcy had been appointed in February, and the three months allowed for disclaiming elapsed on May 29th last. A further extension of two months was now asked for.

The lease sought to be disclaimed had been mortgaged by the bankrupt.

An affidavit by the trustee was read in support of the application.

E. Cooper Willis, Q.C. (Finlay Knight with him), for the mortgagee (after reading an affidavit by the mortgagee), said :

The trustee in a case like this, when he asks leave for an exten-

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IN RE
G. PRICE.

sion of time to disclaim, must give some reason for doing so. Here the trustee simply says he would like to have further time to consider. Further, in this case the three months given to him by the Act have elapsed. In considering a case of this kind, section 55 of the new Act ought to be compared with section 23 of the Act of 1869, and also with section 105 of the recent Act. Section 55 says that the disclaimer may be exercised "at any time within three months after the first appointment of a trustee." Section 23 of the Act of 1869 provided that,—“When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and, upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove for the same as a debt under the bankruptcy.”

There is no time mentioned or limited in that section or in the Act except in the next section 24 which said: “The trustee shall not be entitled to disclaim any property in pursuance of this Act

in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the same or not." Under the old Act it was clearly decided that if an extension of time was required the leave of the Court must be asked for within the time thus limited. In *Ex parte Lovering, In re Jones* (L. R., 9 Ch. Div. 586; 43 L. J., Bank. 94; 30 L. T. 621), it was laid down that "where the trustee of a bankrupt's estate has received a notice calling upon him to disclaim a lease within twenty-eight days under section 24 of the Bankruptcy Act, 1869, and requires an extension of time beyond the twenty-eight days, in order to obtain the consent of the Court under Rule 28 of the Bankruptcy Rules, 1871, he must apply for such extension before the twenty-eight days have elapsed, unless he can show some special circumstances to excuse the delay." Now I submit that if section 55 is read by itself there is no power to ask for an extension after the three months have elapsed. But by section 105, sub-section (4), of the new Act, I admit it is provided that, "where by this Act or by general rules the time for doing any act or thing is limited, the Court may extend the time either before or after the expiration thereof, upon such terms, if any, as the Court may think fit to impose." But I would call your Lordship's attention to the fact that that provision is among a series of sections all relating to and headed "Procedure." This question is a question of disclaimer, it is not with regard to procedure. Your Lordship has to say whether this section 105 applies to a case of disclaimer at all. If the word "procedure" at the head of the section does not limit its operation, then the words of it are, of course, strong enough to embrace a case of this kind.

[CAVE, J. : I am always inclined you know, Mr. *Willis*, to take as general an application as I can.]

Then admitting that, there must be some reason shown for the delay, and some reason for an extension of time. Here the trustee was appointed in February; the three months would elapse on May 29th. He had plenty of time to disclaim. It is not sufficient

1884.
IN RE
G. PRICE.

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G. PRICE.

for the trustee to say "I have not made up my mind." He must give some reason.

[CAVE, J. : He says the best time for selling is just approaching. That is one of the best ways of finding the true value of the property.]

An injustice would surely be done to the mortgagee if an extension of time is given. If disclaimer had been made at once, the mortgagee could have a vesting order and could act immediately. (*Bankruptcy Act*, 1883, section 55, sub-section 6.) Now if leave for extension is given, and the trustee finally does not sell, the mortgagee is hung up practically until after the long vacation. At any rate I submit that the trustee should be put upon terms (1) that the property should be put up within a certain period; (2) that he should pay the ground rent; and (3) that he should pay the current interest during the time the right of the mortgagee is suspended and his title kept in abeyance; the interest I mean from the expiration of the three months until the trustee does disclaim.

CAVE, J. :

I think I ought only to give an extension of time for a fixed period, and on the trustee paying the ground rent and paying interest. It is not fair that a suspension should be given at the expense of the landlord or the mortgagee. The trustee is trying to obtain this. The trustee cannot be allowed to keep this matter in suspense at the expense of the mortgagee. I cannot give an order unless upon terms. Under the circumstances, however, as the landlord is not present or represented, I will allow the matter to stand over for a week, granting an extension for that time, with liberty to serve notice of the application on all parties for this day week.

Solicitors : *Clarke & Calkin* for the mortgagee.

CASE relied upon :—

Ex parte Lovering, In re Jones, L. R., 9 Ch. Div. 586; 43 L. J., Bank. 94; 30 L. T. 621.

June 23rd.

On this date application was made by the trustee for leave to disclaim, which was granted.

PRACTICE.

IN RE WEMYSS, EX PARTE WEMYSS.

Bankruptcy Act, 1883, Section 104—Petition—Payment in full—Application to rescind Receiving Order.

DIVISIONAL
COURT.

BEFORE
CAVE, J.,
MATHEW, J.,
DAY, J.
1884.
June 18.

In a case where after a petition had been filed by a debtor in the County Court, the unsecured creditors of such debtor had been paid in full, and an application was in consequence made to withdraw the petition, which application the County Court judge refused to grant, on the ground that he was doubtful as to his power to do so—

Held: That there was clear jurisdiction to grant the application.

THIS was an appeal from the County Court of Birkenhead.

The facts of the case were as follows :—

On May 5th last a petition was filed in the County Court by the debtor, *Wemyss*, whose debts then amounted to something like 3,300*l.*, of which sum 1,800*l.* was owed to the debtor's father, and 700*l.* to unsecured creditors, the only other creditor being fully secured.

Before the debtor was adjudicated a bankrupt, however, his father came forward and paid all the unsecured creditors in full.

An application was in consequence made to the Court, with the assent of the father and the fully secured creditor, to rescind the receiving order and to allow the petition to be withdrawn.

The learned judge of the County Court, while admitting that the case was one where such a course might be properly taken, stated that he had some doubt as to his power to grant the application for a withdrawal, and reserved the question for an appeal, staying all proceedings in the meantime.

J. Linklater, for the appellant, after stating the facts, said :

The case falls under section 104 of the Bankruptcy Act, 1883. By that section it is provided that (1) "Every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction." I sub-

1884.

IN RE
WEMYSS,
EX PARTE
WEMYSS.

mit that by the terms of this section the County Court judge had full power to grant the application made to him.

MATHEW, J. :

The County Court judge has raised an unnecessary difficulty. There is not the slightest doubt that he had the power, and in my opinion the case is one in which he ought to have exercised it. There was clear jurisdiction to grant the application. I do not think we ought to be called upon to decide a point of this description.

CAVE, J., and DAY, J., concurred.

Appeal allowed.

Solicitors : *Pritchard, Englefield & Co.* for the appellant.

IN RE ROGERS, EX PARTE ROGERS.

Bankruptcy Act, 1883, section 18 — Composition — Reasonable — Rash and Hazardous Speculations—Refusal of County Court Judge to approve.

DIVISIONAL
COURT.

BEFORE
MATHEW, J.
CAVE, J.
DAY, J.

1884.

June 18.

A Court to whom application is made to approve a composition accepted by the creditors of a debtor under section 18 of the Bankruptcy Act, 1883, must exercise its own discretion in determining whether such composition is reasonable and calculated to benefit the general body of creditors, and if such Court is not satisfied with all the circumstances attending the debtor's conduct and the acceptance of the composition, it is its duty to refuse its approval.

In a case where a debtor within the space of about eighteen months had allowed a debt due to him from a person whom he knew to be in pecuniary difficulties to increase from 32,000*l.* to more than 60,000*l.*, and it appeared that to the amount of 11,000*l.* this increase was due to accommodation bills, and such debtor subsequently stopped payment and presented a bankruptcy petition, and a composition was accepted by the creditors—

Held: That the debtor had been guilty of rash and hazardous speculations, and that, even if the composition were reasonable, the Court ought to refuse its approval.

THIS was an appeal from a decision of the learned judge of the Liverpool County Court, by which he had refused to sanction a composition offered by the debtor, *Rogers*, and accepted by the creditors, under section 18 of the Bankruptcy Act, 1883.

Sub-section (5) of section 18 provides that "The Court shall, before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor."

And by sub-section (6), "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act, where the debtor is adjudged bankrupt, to refuse his discharge, the Court shall, or if any such facts are proved as would, under this Act, justify the Court in refusing, qualifying, or suspending the debtor's discharge

1884. [see *Bankruptcy Act*, 1883, section 28, sub-sections (2) and (3)], the Court may, in its discretion, refuse to approve the composition or scheme.”
IN RE ROGERS,
EX PARTE
ROGERS.

The debtor, *Rogers*, was a fruit merchant, having large business transactions with certain foreign houses, and it was alleged that the difficulties of the debtor were chiefly brought about by the failure of certain of these houses, owing to which he had become involved.

On January 7th last, the debtor sent out a circular stating that he was unable to pay his debts, and was about to suspend payment, thereby committing an act of bankruptcy.

No further steps were taken, however, until March 31st, when the debtor presented his own petition.

At the first meeting of creditors the debtor offered a composition of 3s. 6d. in the pound which was not then accepted, but at a second meeting this composition was agreed to, and application was subsequently made to the Court for its approval.

At the hearing of this application the usual report of the official receiver was read, and in this the official receiver stated that in his opinion the composition was not reasonable, and also that the debtor had been guilty of rash and hazardous speculations, it having been brought to light (amongst other things) that within the course of about eighteen months the debtor had allowed a debt due to him from one merchant in Greece, whom he knew to be in pecuniary difficulties, to increase from 32,000*l.* to more than 60,000*l.*, the whole of which was apparently irrecoverable, and it appeared that to the amount of 11,000*l.* this increase was due to accommodation bills.

On the ground (1) that the composition was unreasonable, and (2) that the debtor had been guilty of rash and hazardous speculations, the learned judge thereupon refused his approval.

From this decision the debtor now appealed.

Mulholland for the appellant.

The Act specifies two grounds on which the Court may refuse to approve a composition—first, where it is not reasonable, or calculated to benefit the general body of the creditors; and secondly, where the Court would be compelled by the Act to refuse, or would

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1884

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4, ESSEX COURT,
TRIPLE, E.C.
October 3rd, 1884.

be justified in refusing, qualifying, or suspending a debtor's discharge in case of bankruptcy. In the present case the judge refused to approve the composition on both these grounds. I submit that in both the judge was wrong. The assets amounted to about 14,000*l*. The composition offered was 3*s*. 6*d*. in the pound; in reality above the assets, which were only sufficient for 3*s*.; but the remaining sum required was to be obtained from the debtor's friends. With regard to the question of fairness and reasonableness, I admit that an investigation instituted by the creditors into the affairs of a debtor may not be as close and searching as an official investigation. At the same time the question whether a composition is fair and reasonable is one which concerns the creditors alone, and surely they are the best judges of their own interests. It is true that at the first meeting the composition was not accepted; at the second, however, it was approved by creditors and proxies to the amount of 62,000*l*., and no creditor voted against it. A committee was appointed to examine into the business of the debtor, and a Mr. *Banner* was instructed to go through the debtor's books, and make a report. He reported that the books were well kept and balanced. There is no ground to suppose that any of the proofs were illusory, or that in the intervening period between the act of bankruptcy in January and the filing of the petition in March the business was in any way improperly conducted. Then there is the other question of rash and hazardous speculations. The custom of the fruit trade is for the merchants abroad to draw upon the brokers in England in advance, and large bills had been drawn against the debtor. The failure was brought about solely by the great fall in the value of fruit produce, and the transactions which have been impeached were in the ordinary course of trade. The official receiver in his report did not say that the debtor had been guilty of any of the offences mentioned in section 28. The debtor may have continued his trading longer than he should, but that does not amount to rash and hazardous speculations. Moreover section 170 of the Act is the only section which is retrospective. The provisions of section 28 are not so, and they will not apply to acts done by a debtor before the Act came into operation.

M. D. Chalmers appeared to watch the case on behalf of the official receiver.

M.B.

M

1884.
IN RE ROGERS,
EX PARTE
ROGERS.

1884. MATHEW, J. :

IN RE ROGERS,
EX PARTE
ROGERS.
Judgment.

I am of opinion that the judgment of the County Court judge in this case must be upheld. This case illustrates very clearly the difference between the old bankruptcy procedure and the new, and I venture to say, shows greatly, as it appears to me, the advantage of the new practice over the old.

The question before the County Court judge was, whether the composition accepted by the requisite majority in value and number under the Act was to be binding on all the creditors. But to determine that question it becomes necessary for the Court to say whether the amount of composition offered was fair and reasonable; and, secondly, to determine whether there was anything in the conduct of the trader, within the meaning of section 28 of the new Act, to disable or prevent the Court from expressing its approval of the composition which had been offered. The two questions have to be dealt with independently and distinctly. I agree with Mr. Mulholland that with reference to the first question, the fact that it mainly concerns the creditors whether the composition is fair and reasonable is to be borne in mind, and that it is less a question affecting public interests than the other, where the Court intervenes for the sake of the credit of the mercantile community at large and the regularity of mercantile transactions. In this case the ordinary steps were followed. The report of the official receiver upon the statement of the debtor's affairs was made to the Court; and the circular having been sent out addressed to the creditors announcing the insolvency of the firm of the 7th of January, it appears that it was not until the 31st of March that a petition was filed, upon which the subsequent proceedings took place.

Now the first thing to enable the Court to form a judgment as to whether or not the composition offered was fair and reasonable was to ascertain what the real position of the estate was at the time when the act of bankruptcy had been committed, when the circular was sent round. The first point to which the official receiver very properly directed the attention of the Court was the dealing with the estate in the interval between the 7th January and the 31st of March. It was the duty of the Court to inform itself as to what the real position of the estate was. What has been the answer suggested? That the Court has been relieved of

gation, if, somehow or the other, a result has been arrived at the rough and ready way which the creditors, or the majority of them, within the meaning of the Act, are content with when the matter comes to be submitted to them. The rough and ready method adopted in this particular case was this. It appeared that the bankrupt was a fruit broker, and in that capacity he received consignments of fruit from merchants, who drew upon him in the ordinary way in respect of the consignments. Various of those consignments had come to hand, and were in process of realization at the date when the circular was sent out. Moneys were received subsequently, and instead of the superintendence and supervision contemplated by the Act under the circumstances, the matter was entrusted to a very respectable man, no doubt, Mr. *Banner*, who was a member of a firm of accountants. He was directed to conduct an irregular process of liquidation in respect of those transactions and those consignments. I daresay he did his best, but he was endeavouring to accommodate conflicting claims and interests, claims of creditors in respect of consignments, and claims of other creditors of the insolvent firm. We are told that considerable difficulties presented themselves, and that considerable opposition was offered, in the first instance, to what was being done, but ultimately the irregular committee, who were to supervise what Mr. *Banner* was doing, appear to have been content, and to have so reported to the creditors.

Now that matter having been brought before the judge, who has to say whether or not the composition was fair and reasonable, he tells us by his judgment that he was not satisfied that that dealing with that portion of the bankrupt's estate was a proper mode of dealing with it. That is the first ground on which he has refused to sanction the transaction in question. It is said he ought to have been satisfied. He did not think he ought to accept what this irregular committee had agreed to be satisfactorily done, in substitution for his own opinion. Speaking for myself I think that he was very wise in that conclusion, and even if I was less clear than I am I should hesitate very long before I interfered with that conclusion. In bankruptcy cases, particularly, confidence ought to be reposed in a judgment of the judge before whom the proceedings of a bankruptcy are conducted. He has an opportu-

1884.

IN RE ROGERS,
EX PARTE
ROGERS.

1884.
IN RE ROGERS,
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nity of seeing the people, and has far more opportunity of judging of the case than anybody else. Therefore, on that ground, I agree with the judge in his conclusion. Other matters were presented for his determination by the official receiver, on which he has pronounced an opinion unfavourable to the scheme of composition. The second point was, that though proofs had been admitted to a very large amount, and the assenting creditors appear to be 62,000*l.*, a very large balance was apparently not represented, except by the opinion of the majority on this subject. Some proofs had not come in at the time the matter was before the judge. A considerable margin still remained. Having regard to the character of the composition in the case, the amount of it, and the mode in which it was to be paid, it appeared to the judge that he ought to be satisfied that the whole of those debts were real debts charged on the estate, because it was pointed out if the debts were less the fund was created for the payment of this very composition out of the margin if they did not represent the genuine transactions. The judge, feeling he was bound to be satisfied that the estate was fairly represented to him, and that he knew enough about it to say if he was satisfied, he thought he was not satisfied. I can see no reason to differ from the conclusion to which he comes with regard to that. Now we were pressed by Mr. Mulholland that the composition offered was a composition beyond the amount of the assets; that a sum of 3,000*l.* or 4,000*l.* must be got elsewhere for the payment of the composition, spread as it was over two years. It became extremely important, under the circumstances, to look and see whether there was any such margin as was suggested. Then it became all the more important to look at another transaction which was brought to the attention of the judge, and that was the transaction of the sale of the business. It was a business of a peculiar kind, carried on for a long time apparently with a very small capital, 2,000*l.*; and it appeared that this business had been disposed of, and that nothing had been realized from the sale of it. It may be said, "What good is to be got out of a bankrupt's business; who is likely to pay a farthing for it?" That may be a judicious observation to make; but it turned out in this case that an arrangement had been come to under which the bankrupt was to enter the business and become a partner in the new firm. The

judge thought, under these circumstances, that it ought to be investigated, whether or not this business (capable of yielding 6,000*l.* a-year) was not the business which was to be carried on by the bankrupt again, and from which a greater sum might be expected over the two years during which the composition is to be paid than the amount of sixpence in the pound by certain instalments, which the bankrupt had agreed to pay. There, again, his discretion was soundly exercised with reference to the question of whether the composition was fair and reasonable, and I do not differ from the conclusion of the learned judge.

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Then there remains the other question, as to the character of the business that this trader was carrying on, and as to whether his losses were brought about, or not, by rash and hazardous speculations. It is only necessary to quote the figures, I should have said (without a very clear explanation of how those figures were possible), in order to come to the conclusion that the trading must have been rash and hazardous, and that the bankruptcy was probably due to the rash and hazardous speculation. A particular debtor in the year 1882 owed the estate from 32,000*l.* to 35,000*l.* In the course of one year, between 1882 and the early part of 1884, when the firm stopped payment, the debt had swollen from 32,000*l.* to 65,000*l.* There might have been an explanation of how that happened, without the suggestion of there being anything rash and hazardous, in the speculation of the bankrupt. But the learned judge was not without information on this subject. He had before him a letter, written as late as the 21st November, 1882, by the bankrupt to the debtor at a time when the debt was about 32,000*l.*; and in that letter the greatest possible pressure was exercised by the bankrupt upon his debtor to induce him to make some payment on account. All that we know is that the trader in question subsequently came to this country, and had by some representation of the possible consignments he was to make hereafter, as to the credit which would possibly be developed in Patras by the state of the market here to the advantage of the Patras merchant, further by the hope that the brothers-in-law in Greece of the merchant would find a sum of 5,000*l.* or 6,000*l.*, the debtor was induced to go on, and to permit his debt to be increased from the sum of 32,000*l.* to the sum of 65,000*l.* Really, all that the trader could

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put his finger upon, as the fund from which the old debt of this gentleman was to be paid, was the probable rise in the market here; and, for the sake of the possible rise in the market here, the trader abroad was kept going for another year. With the hope that the rise of the market would enable the debt to be paid, a further debt of nearly the same amount was contracted between them. I do not differ from the conclusion which the learned judge came to as to that,—that this was a rash and hazardous speculation within the meaning of the Act of Parliament. I, therefore, agree with him in his view, that this composition ought not to have been sanctioned by the Court.

CAVE, J.:

I am of the same opinion. It is not sufficient that the creditors themselves come to the conclusion that the terms of a composition are reasonable, although that is an element which, without doubt, ought to be taken into account. It is for those who propound the scheme to satisfy the judge whose approval they wish to obtain, that it is reasonable and calculated to benefit the general body of creditors. The County Court judge was of opinion that this had not been established, and with his decision I entirely agree. Then as to the rash and hazardous speculations. A debt of one foreign merchant named Anino, was allowed to increase from 32,000*l.* to 65,000*l.*, in the space of one year. It was explained that what the debtor did was to make advances in the nature of accepting bills drawn by Anino's agent, for which Anino undertook to send forward produce; Anino, it appears, did not send forward produce, or if he sent forward produce he sent it forward to a less extent than the bills he had actually drawn. The consequence was, as I have said, that the debt ran up from 35,000*l.* to 65,000*l.* in about a year, but when you come to look into the papers you will see that there was a great deal more than that which was going on. Not only was Anino drawing upon produce to be forwarded, but he actually was drawing purely accommodation bills upon the debtor. The debtor admits that Anino drew upon him, and sent him other bills in exchange, not produce, but other bills in exchange, and consequently he was, under the guise of accepting bills as against future produce, really accepting bills against bills which Anino had sent

to him. He was engaged consequently in endeavouring to keep Anino afloat, not by the legitimate transaction of acting as broker for Anino, but by accepting bills for him by way of discounting bills which Anino had sent to him. I am clearly of opinion in this case that the learned County Court judge has exercised his discretion rightly, and that if I had been in his place I should have come to the same conclusion as he did.

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DAY, J.:

I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Whitley, Maddock & Co.* for the appellant.

The Solicitor to the Board of Trade for the official receiver.

DIVISIONAL COURT. IN RE WALKER, Ex PARTE GOULD, OFFICIAL RECEIVER.

BEFORE
MATHEW, J.,
CAVE, J.,
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(*The Lynn Dock Company's Lease.*)

Bankruptcy Act, 1883, Section 149.

Lease—Forfeiture on Bankruptcy, or Filing a Petition in Liquidation, or on making an Assignment for the Benefit of Creditors—Fixtures.

A lease of a mill and warehouse made October 1st, 1880, for twenty-one years contained the following covenants and provisoes:—

“That in case the said lessees shall during the said term be bankrupts, or file a petition in liquidation, or make an assignment for the benefit of their creditors, then the said term hereby created shall cease.”

“That on the determination or cesser of the said term the machinery-room, warehouse and chimney shall be and remain the property of the company, but all the machinery and also all the other buildings erected by the lessees shall be their property, and shall be removed by them previously to the determination or cesser of the said term, unless it shall be then mutually agreed by the said company and the lessees that the company shall purchase them. The said lessees in case the same shall be removed to make good all damage which may be caused in their removal.”

“That the several articles and things mentioned in the schedule hereto (*consisting of iron columns and beams in boiler-room, wood floor in oil mill, and other articles, see post, p. 169*) shall be the property of the lessees, and shall be removable by them; the said lessees making good all damage done by such removal.”

In March, 1884, the lessees presented a bankruptcy petition under the Bankruptcy Act, 1883, upon which a receiving order was made.

Held:—(1) That the lessees had taken such steps under the Bankruptcy Act, as, having regard to the provisions of the new Act and to section 149 of it, would justify the lessors in saying that the clause of forfeiture applied, and that consequently the presentation of the petition by the lessees caused a cesser of the term under that proviso.

(2) That the official receiver was entitled to the articles mentioned in the clauses above, notwithstanding the forfeiture.

THIS was an appeal from a decision of the learned judge of the County Court at King's Lynn.

The facts of the case were as follows:—

On October 1st, 1880, a lease of a certain mill and warehouse situate at King's Lynn, was granted by the King's Lynn Dock

Company to the debtors, *William and Edward Walker*, for twenty-one years, at a rent of 1,114*l.* 15*s.* 10*d.* payable half yearly. Amongst others, this lease contained the following material covenants and provisoes :—

“ That in case the said rent shall be in arrear for twenty-one days, or the said lessees shall during the said term be bankrupts, or file a petition in liquidation, or make an assignment for the benefit of their creditors, then the said term hereby created shall cease.”

“ That on the determination or cesser of the said term the machinery-room, warehouse and chimney shall be and remain the property of the company, but all the machinery and also all the other buildings erected by the lessees shall be their property, and shall be removed by them previously to the determination or cesser of the said term, unless it shall be then mutually agreed by the said company and the lessees that the company shall purchase them. The said lessees, in case the same shall be removed, to make good all damage which may be caused in their removal.”

“ That the several articles and things mentioned in the schedule hereto shall be the property of the lessees, and shall be removable by them, the said lessees making good all damage done by such removal.”

The schedule enumerated the following articles : “ Iron columns and beams in boiler-room ; wood floor in oil mill ; tooled York floor in oil mill, engine-room and boiler-house ; Bramley fall stones to columns ; brick piers under machinery columns ; eleven beams for supporting machinery ; plate hoppers in warehouse for feeding millstones.”

On December 11th, 1882, this lease was deposited with Messrs. Foster, bankers, of Cambridge, by way of equitable mortgage, all the fixtures except trade machinery being included in the deposit note.

On March 13th, 1884, a receiving order was made in the Lynn County Court against the debtors on their own petition, whereby their property vested in the official receiver, who thereupon entered into possession of the demised premises ; but on March 25th, during the absence of the workmen, the lessors seized the premises in question upon a claim founded on the forfeiture clause in the lease, and in April 7th they placed a man in possession.

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An application on behalf of the official receiver was subsequently made to the County Court at King's Lynn, for an order directing the lessors to give up the premises to him, but the learned judge refused to accede to this request.

From this decision the official receiver now appealed.

On the opening of the case an objection to the jurisdiction under section 102 of the Bankruptcy Act, 1882 (General Power of Bankruptcy Courts), was put forward by the counsel for the lessors, but this was subsequently waived, and the case proceeded on the merits.

Winslow, Q.C. (Yate-Lee with him), for the appellant.

The clause relied upon says that the lease shall be forfeited in case the lessees shall be "bankrupts, or file a petition in liquidation, or make an assignment for the benefit of their creditors." The clause must be construed strictly. Here the lessees are not bankrupt, for there is no real bankruptcy until adjudication, they have not filed a petition in liquidation, they have not made an assignment for the benefit of their creditors. The presentation of a bankruptcy petition by a debtor under the Bankruptcy Act, 1883, is not equivalent to the filing of a liquidation petition under the Bankruptcy Act, 1869. There is in consequence no forfeiture. Further, it is necessary to notice the particular and precise provisions of the lease as contained in clause 4, where it is provided that the articles mentioned in the schedule "shall be the property of the lessees, and shall be removable by them;" and in clause 3, "all the machinery and also all the other buildings erected by the lessees shall be their property, and shall be removed by them previously to the determination of the said term, &c." If there has been a forfeiture the lessees are entitled to the fixtures. A lessee is entitled to a reasonable time after the expiration of his term within which to remove any fixtures which belong to him. (See *Stansfield v. Corporation of Portsmouth*, 4 C. B., N. S. 120; 4 Jur., N. S. 440.)

In the present case the property in the articles in question is expressly given to the lessees. The effect of the proviso is to give the lessors a right to damages if the articles are not removed within the time specified.

A. Charles, Q.C. (Horace Browne with him) for the lessors.

It is true it cannot be strictly said that the lessees filed a petition in liquidation. But section 149 of the Bankruptcy Act, 1883, provides (2), "where by any Act or instrument reference is made to the Bankruptcy Act, 1869, the Act or instrument shall be construed and have effect as if reference was made therein to the corresponding provisions of this Act." I submit that the lessees have taken such steps under the Bankruptcy Act as, having regard to the provisions of the new Act and section 149 of it, to justify the lessors in saying that there was a forfeiture.

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[MATHEW, J. : We are with you on that point.]

Then what are the consequences ? Where a landlord takes possession of premises where fixtures have been placed, if they have not been removed before the expiration of the term they belong to him.

[CAVE, J. : There is a special proviso here that the fixtures shall be the property of the lessees.]

The words of clause 3 are "and shall be removed by them previously to the determination or cesser of the said term." I submit that there is a positive agreement that these articles shall be removed prior to the determination of the term. This clause 3 applies to articles not mentioned in the schedule, and as they were not removed during the term the lessees' right to them is gone altogether. The articles mentioned in the schedule are part of the fabric of the building, and the effect of it is to put among the class of trade fixtures, things which would otherwise belong to the landlord.

MATHEW, J. :

This was an application to the learned County Court judge of Judgment. the County Court of Lynn sitting in bankruptcy, made by the official receiver, that the official receiver should be placed in possession of a mill and premises, and fixtures and articles they contained, which had belonged to the bankrupts, from which it was said that the receiver had been improperly evicted. The first question that was presented was one of jurisdiction, and a question

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that depended upon matters of fact whether or not the receiver had been turned out of possession or not. That question again depending upon this: whether or not he had taken possession after his appointment at the time when the lessors, the Dock Company, had entered upon the premises. Now, upon hearing the evidence read to us by Mr. *Charles*, there was no question, as it seemed to us, that the receiver had entered, and so far as the receiver was in possession of the premises as an officer of the Court he had entitled himself to the protection of the Court. The lessors appear to have availed themselves of the absence of workmen to take possession, by locking the doors of the premises in question, and upon that they asserted that the receiver had not been in possession when their rights supervened, and therefore the County Court had no jurisdiction to deal with the case. But we are clearly of opinion that the official receiver was entitled to the protection of the Court in the exercise of the duties of his appointment as official receiver, and that the Dock Company were wrong in taking the law into their own hands as they sought to do. That would have been sufficient in one point of view to have disposed of the application; but the County Court judge has dealt with the whole matter and dealt with the very important question of the rights of the parties. It was with regard to this question that it was thought the opinion of this Court should be taken, and therefore the learned counsel on each side agreed that no question of jurisdiction should be raised, and that we should deal with the matter on the footing that the County Court judge and this Court had entire jurisdiction. The real question in controversy between the parties was this. Whether in the events which have occurred, and having regard to the terms of the lease, the receiver had any right to the articles and things referred to in the lease and which have been spoken of as tenants' fixtures by Mr. *Charles*, or trade fixtures. Now that depended in the first instance upon the question whether or not there had been a forfeiture of the lease. To determine whether or not there had been a forfeiture of the lease it is necessary to examine carefully the provisions in the lease on that question. The clause in question is this: "that in case the said rent shall be in arrear for twenty-one days, or the said lessees shall during the said term be bankrupts, or file a petition in liquidation, or make

an assignment for the benefit of their creditors, then the said term shall cease." Mr. *Charles*, on the part of the landlords, argued that if that clause came into operation, and the lessees had within the terms of it committed a forfeiture, the lessors were entitled to enter and take possession of the premises. His argument was this, that although in strictness it could not be said that the lessees had filed a petition in liquidation, they had taken steps under the Bankruptcy Act, which, having regard to the provisions of the new Bankruptcy Act, and, in particular, to the section which has been referred to (section 149), justified the lessors in saying that the clause of forfeiture applied. It was argued by Mr. *Winslow* for the official receiver, that there had been no forfeiture, inasmuch as the lessees had not been bankrupts, and had not filed a petition in liquidation, and had not made an assignment for the benefit of their creditors. We were pressed with the exact provisions of the clause, and had the ordinary observation made that we must construe the clause strictly, and that inasmuch as a petition in liquidation had not been filed, and could not be filed under the circumstances that had occurred, there was no forfeiture. Now, it is not necessary for me to say whether that clause would have been applicable if there had been no special provision in the Act of 1883 upon the subject. My brother *DAY* appears to think that, independently of the provision of section 149, forfeiture would have been suffered, and that the change of procedure that had been made must be accommodated to the provisions of the lease in that respect. In my view section 149 clearly applied; and I think the filing a petition for liquidation within the meaning of this clause is analogous to filing a petition for the appointment of a receiver under the Bankruptcy Act of 1883, and that the provisions in each Act upon those several subjects are corresponding provisions within the meaning of section 149. Therefore I am of opinion, and my learned brothers agree with me, that there had been a forfeiture of this lease in the circumstances that have occurred. The next important question was, what were the consequences of forfeiture? Mr. *Charles*, for the Dock Company, said the consequences are those that always follow where a landlord takes possession of premises where fixtures have been placed. If they have not been removed before the expiration

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of the term they belong to the landlord. On the other hand, Mr. *Winslow* relied upon the particular and precise provisions of the lease on that subject, and those provisions are contained in clauses 3 and 4 on page 3 of the copy of the lease before me. The provision of clause 4 is, "that the several articles and things mentioned in the schedule hereto shall be the property of the lessees, and shall be removable by them: the said lessees making good all damage done by such removal." We are told that the articles referred to in that clause, and described in the schedule, are fixtures in the fuller sense of the term. Mr. *Charles* has spoken of them as part of the fabric of the building. The clause, therefore, is one which largely alters the common rule of landlord and tenant. In my judgment, it clearly makes the articles in question goods which are to belong to the lessees, and which the lessees are to be entitled to remove upon the terms only of their making good all damage done by their removal. They are to be theirs under that clause, they are to be the lessees without reference to the time at which they are removed, the condition upon which they are to become theirs being the one that the lessees are to make good all the damage done by their removal.

Then there comes another clause upon which reliance has been placed by Mr. *Charles*. That is clause 3. "That on the determination or cesser of the said term, the machinery-room, warehouse and chimney shall be and remain the property of the company; but all the machinery, and also all the other buildings erected by the lessees, shall be their property." To that extent one clause corresponds with the other, and they apparently overlap each other, because, as I gather, the articles described in clause 4 are some of them machinery, and this says, "but all the machinery, and also all the other buildings erected by the lessees, shall be their property." Then comes a clause upon which Mr. *Charles* relied, "and shall be removed by them previous to the determination or cesser of the said term, unless it shall be then mutually agreed by the said company and the lessees that the company shall purchase them: the said lessees, in case the same shall be removed, to make good all damage which may be caused in their removal." Now Mr. *Charles* proposed to read that as if clause 3 expunged clause 4, substituted a different provision for it, and provided that unless

the articles should be removed before the cesser of the term they should belong to the landlord. That is certainly an alteration of the language of the clause in question that I am not prepared to adopt. It is clearly to my mind not what the parties meant. There is an inaccuracy no doubt about the way the clause is framed, but we are not bound to construe it so critically as to defeat the obvious intention of the parties. It is never meant that these goods shall be the property of the landlords, but they are to be the tenants. That is stated over and over again. Provisions are introduced as to the time of their removal, and for breach of those conditions of the lease the lessees are to be answerable, and the remedy is to be by damages. It seems to me the effect of the lease is to give the official receiver, as representing the creditors, the right to these fixtures, and the right to enter and remove them, paying the damage occasioned by the removal. If that be not done, the rights of the parties, as it seems to me, must be ascertained on the footing. . . . With reference to that last observation of mine in deference to my learned brothers, I confine my judgment to this, which seems to be all that is needful for the occasion. That the official receiver is entitled to those fixtures, and the right of the parties must be ascertained upon that footing. I was for myself, in the first instance, disposed to go further, but as my learned brothers have a doubt about it, I will not insist on my own view. The rights of the official receiver are, as I have said, to the articles in question.

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CAVE, J.:

I agree with the judgment which has just been delivered with the slight exception to which my brother MATHEW has just referred. The language of the two clauses we are considering differs. In one of them, it is said that the articles shall be the property of the lessees, and shall be removable by them, the lessees making good all damage done by such removal. Now with regard to that, there is no time mentioned during which they are to be removed. But the language of the third clause of the provision differs, and while it states that the machinery shall be the property of the lessees, it goes on to say, "and shall be removed by them previously to the determination or cesser of the term." To my

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mind those words introduce very considerable doubts whether they are entitled to enter and remove after the determination or cesser of the term, and whether in that case their right is not confined to requiring the lessors to give up to them, of course, in that case, compensating the lessors for any loss they are put to in removing them. I do not know that that makes any practical difference, except this, that in the one case the lessees must do it, and in the other case the lessors must do it, and inasmuch as the lessors are actually in possession of the premises, convenience to my mind seems to point to the lessors doing it, for the lessors will be less likely, as it seems to me, to damage the property unnecessarily when they are dealing with their own premises than the official receiver might.

DAY, J.:

I agree with the judgment delivered by my brother MATHEW except in one particular. I agree with him that in this case there has been a forfeiture, but I do not in coming to that conclusion attach consequence to the section 149, sub-section (2), because I do not think that that sub-section applies. If that sub-section were not to be found in the Act I should still be of opinion that there had been a forfeiture, because I consider that in this case there has been a breach of the condition with reference to filing a petition for liquidation. It is true the lessee did not become a bankrupt, but in my judgment he did file a petition for liquidation, using those words in the sense in which I take it they are used in the lease.

A petition for liquidation is to my mind not used as a technical expression, but is meant to represent any petition for the purpose of getting his affairs liquidated in what may be popularly known as bankruptcy. I am not speaking of becoming bankrupt in strict legal sense, but liquidation under the bankruptcy law, and it seems to me that a petition for the appointment of an official receiver is a petition which is presented for the purpose of getting affairs liquidated, either by bankruptcy, which may be a consequence, or by arrangement in other ways provided by the Bankruptcy Act. It seems to me that the words "file a petition in liquidation," as used in this lease, are fully satisfied by the petition that this tenant did file for the purpose of getting his affairs liquidated by filing a

petition for the appointment of an official receiver. Being of that opinion, I agree with my learned brothers that there was a forfeiture in this case, and I agree with my brother MATHEW in all the rest of the judgment.

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Appeal allowed.

Solicitors: *Waterhouse, Winterbotham and Harrison*, [agents for *Cozens Hardy*, of Norwich,] for the official receiver.
Wedlake, Letts and Wedlake for the lessors.

CASE relied upon:—

Stansfield v. Corporation of Portsmouth, 4 C. B., N. S. 120;
4 Jur., N. S. 440.

PRACTICE.

IN RE STONE, EX PARTE NICHOLSON.

IN RE PHILBY, EX PARTE NICHOLSON.

Bankruptcy Act, 1883, Section 103, Sub-section (4)—*Bankruptcy Rules*, 1883, Rules 269, 270.

BEFORE
MR. JUSTICE
CAVE.
IN CHAMBERS.
1884.
June 21.

Committal—Undertaking to prove means—Office Copy Judgment—Affidavit in denial of Satisfaction—County Court Rules, 1875, Order XIX.
Rule 9—Exclusive or concurrent Jurisdiction of County Court.

THESE cases were references to the learned judge in Chambers, and were brought forward for the purpose of obtaining an opinion from the Court in respect of certain important points of practice in connection with the question of commitment for debt under the Bankruptcy Act, 1883.

1884. Since the passing of the new Act this question had exercised a good deal of attention amongst the legal profession, and it was freely said that the matter was placed on an unsatisfactory footing even by the Act of 1869; but that the new Act of 1883 "had entirely dislocated the already defective machinery." (*Vide Correspondence, Law Times*, June 7th, p. 104.)

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Section 103, sub-sections (1) to (6) of the Bankruptcy Act, 1883, provides generally "judgment debtors' summons to be bankruptcy business;" and by Rule 269 of the Bankruptcy Rules, 1883, it is provided that "no inferior Court within the London Bankruptcy District shall exercise jurisdiction under section 5 of the Debtors Act, 1869, in respect of any judgment of the High Court." While by Rule 270, "The County Court Rules, for the time being in force as to the committal of judgment debtors, shall with any necessary modifications apply to all Courts exercising jurisdiction under section 5 of the Debtors Act, 1869, provided that any reference therein to the Bankruptcy Act, 1869, shall be deemed to extend also to the corresponding provisions of the Bankruptcy Act, 1883."

In order to secure some definite decision of the Court, with regard to certain points of which especial complaint had been made in the working of these provisions, the present cases had been selected and carried forward.

These points of complaint may be shortly indicated as follows:—

- (1) That the County Court Rule of 1870, requiring an undertaking to prove means, had been superseded, and that such Courts continued without statutory authority to demand it.
- (2) That the London Bankruptcy Court was itself the High Court, and that the rule requiring an office copy judgment and an affidavit in denial of satisfaction (on the footing of its being "another" Court) was inapplicable.
- (3) That hitherto no affidavit had been required in the Queen's Bench Division to issue a summons whatever the date of the judgment.
- (4) That the Bankruptcy Act, 1883, section 103, sub-section (4) could only have been intended to give County Courts concurrent and not exclusive jurisdiction over High Court judgments.

The attention of the sitting registrars had already been called to these points, and after mature consideration it was intimated that they could see their way to acceding to points (1) and (2), and also to point (3), as regards judgments under four months old; and it was stated that directions had been given to dispense with these formalities in the future.

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As to judgments over four months old, however, they thought that they would be exceeding their powers if they dispensed with the affidavit, and on that point and also on point (4) the matter was referred to the judge.

F. W. Munton, Solicitor, said :—

These cases which may be taken together raise most important points, and I have to ask your Lordship's indulgence while I state them somewhat fully. I may say at once that although they have come to me in my private practice, I am really asking the opinion of the Court, as a member of a special committee of the Incorporated Law Society, who are anxious to have some intimation from and decision of your Lordship upon the questions. The whole of the High Court practice under section 5 of the Debtors Act, 1869, has now, in pursuance of section 103 of the recent Bankruptcy Act, been assigned to the Bankruptcy Division. Under sub-section (4) of section 103 of the Bankruptcy Act, 1883, which is as follows: "every County Court within the jurisdiction of which a judgment debtor is or resides shall have jurisdiction under section 5 of the Debtors Act, 1869, although the amount of the judgment debt may exceed fifty pounds;" and by Rule 269 of the Bankruptcy Rules, 1883, "no inferior Court within the London Bankruptcy District shall exercise jurisdiction under section 5 of the Debtors Act, 1869, in respect of any judgment of the High Court;" and by Rule 270 "the County Court Rules for the time being in force as to the committal of judgment debtors shall, with any necessary modifications, apply to all Courts exercising jurisdiction under section 5 of the Debtors Act, 1869, provided that any reference therein to the Bankruptcy Act, 1869, shall be deemed to extend also to the corresponding provisions of the Bankruptcy Act, 1883"—under the Act and these rules the County Court Regulations as to judgment commitment summonses are applicable to the London

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Court of Bankruptcy, and summonses on High Court judgments for any amount are now issuable out of County Courts having bankruptcy jurisdiction. In County Courts an applicant for a commitment summons is called upon to sign an undertaking to prove the debtor's means, and if the judgment be one of an outside Court, an office copy of such judgment, with an affidavit negating satisfaction, must be produced, and in all cases where the judgment is over four months old, such affidavit is made obligatory. The registrar has already expressed an opinion upon the question of the undertaking, but I mention it before proceeding to the other and more important points. Such a provision might be beneficial in a case of ignorant litigants appearing in person in a County Court, but it is certainly humiliating on a judgment out of the High Court that the plaintiff or his solicitor has to undertake to prove the debtor's means.

[CAVE, J. : It is a warning merely. You cannot complain of that surely. I cannot see that it is humiliating.]

In the present the onus probandi is on the plaintiff.

[CAVE, J. : That is of course.]

If the defendant does not appear, the plaintiff in a large number of cases cannot prove means, it is impossible to prove means: therefore it would be to the defendant's advantage not to appear.

[CAVE, J. : I should act upon very slight grounds if the debtor does not appear. I should act, and leave the defendant to appear and ask me to set aside the order, and explain his absence satisfactorily if he could.]

I am perfectly satisfied with such an expression of opinion from your Lordship.

Further, with regard to the affidavit in denial of satisfaction. Rule 9 of Order XIX. of the County Court Rules, 1875, provides that "where a party desires to enforce by commitment in any County Court a judgment of any competent Court, he shall obtain from such Court an office copy of the judgment he desires so to enforce, and shall file such office copy, together with an affidavit

of the sum then due thereon, with the registrar of the Court of the district in which the party against whom the same is to be enforced resides or carries on business, who shall thereupon issue a judgment summons." But it seems to have been overlooked, that the Bankruptcy Court has now become a part of the High Court, and the reason for such an affidavit, which was to satisfy the judge that no payment had been made into Court, has now disappeared. The fact is, that the officers of this Court have adopted the County Court Rules *in toto*, without regard to their applicability; but Rule 270 of the Bankruptcy Rules, 1883, says that the County Court Rules, as to the committal of judgment debtors, are to apply to all Courts, but "with any necessary modifications." I submit that this is such a modification as ought to be made.

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IN RE STONE,
EX PARTE
NICHOLSON.
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[CAVE, J. (after looking at the affidavit and the rule) said: I do not think you ought to be obliged to file this affidavit. With regard to the first point, in respect of the undertaking, I think your objection is hypercritical.]

Then, as to the question of exclusive or concurrent jurisdiction of the County Court. Up to the end of last year, after judgment in the High Court, you were at least kept there. Now, where a matter has to be dealt with in the Bankruptcy Court as debtor's summons, it may be enforced in a County Court. And hitherto the London Court has treated the section as giving to the County Courts exclusive jurisdiction. It is sending every High Court judgment over to the County Court to be enforced. For example, you may obtain judgment, and have to go to Northumberland to enforce it.

[CAVE, J.: It is equally hard if the debtor has to come from Newcastle here.]

Surely the man who does not pay his debts ought not to receive more consideration than one who does. The question is one of considerable moment, and I trust your Lordship will not think it necessary to compel the profession to enforce their High Court judgments either in County Courts or through similar entangled machinery, only appropriate in dealing with trivial sums and litigants in person.

1884. [CAVE, J.: The point you put is, Is the jurisdiction exclusive?
 I am opinion that it is concurrent. But I should also hold that
 when a debtor is summoned to this Court, and resides at a distance,
 there must be strict proof of his means if he fails to appear; and
 I should have to consider the propriety of allowing costs.]

IN RE STONE,
 EX PARTE
 NICHOLSON.
 IN RE PHILBY,
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 NICHOLSON.

CAVE, J.:

Judgment.

The points in this case have really resolved themselves to two,—
 First, as to the affidavit. I am of opinion that this affidavit, which
 is spoken of in Rule 9 of Order XIX. of the County Court Rules,
 1875, should not be required in this Court. The rule says, “where
 a party desires to enforce by commitment in any County Court a
 judgment of any competent Court, he shall obtain from such Court
 an office copy of the judgment he desires so to enforce, and shall
 file such office copy, together with an affidavit of the sum then due
 thereon, with the registrar of the Court of the district in which the
 party against whom the same is to be enforced, resides or carries
 on business, who shall thereupon issue a judgment summons.” Of
 course the necessary proof would ultimately have to be given; but
 it is sufficient to my mind if that is done when the affidavit of
 means has to be prepared. With regard to the other point, whether
 this Court has authority to issue a judgment summons on a judg-
 ment of the High Court when the debtor does not reside within its
 jurisdiction, in my opinion it has authority. The judge in bank-
 ruptcy is now a judge of the High Court, and the jurisdiction is
 the jurisdiction of the High Court, and extends over the whole of
 England. In my opinion, therefore, the jurisdiction given by sub-
 section (4) of section 103 of the Bankruptcy Act, 1883, is not an ex-
 clusive but a concurrent jurisdiction. But, on the other hand, I must
 say if the debtor is to be compelled to appear in the High Court
 when he resides in another jurisdiction, it might be a great hard-
 ship. The plaintiff must remember the rule of law as to following
 a judgment. Therefore I shall hold that when the debtor does not
 reside within the jurisdiction strict proof of means must be given,
 and I am of opinion that the debtor should not be expected to ap-
 pear personally, at any rate unless his expenses as a witness have
 been tendered by the creditor. It would be a great hardship other-
 wise. Suppose, for example, a debtor had to come from Newcastle,

a journey the very travelling expenses of which he might be without the means of defraying. He certainly should not be expected to attend personally unless his expenses are tendered, and I should allow no costs unless good cause can be shewn why the summons was taken out in this Court. I see no reason why this should be done, merely because the plaintiff happens to reside within this jurisdiction.

1884.

IN RE STONE,
EX PARTE
NICHOLSON.
IN RE PHILEY,
EX PARTE
NICHOLSON.

PRACTICE.

IN RE LASCELLES, EX PARTE GENESE.

Bankruptcy Act, 1883, Sections 103 and 104—Application under Section 5 of the Debtors Act, 1869—Appeal to what Court.

Held :—That by reason of the provisions of sections 103 and 104 of the Bankruptcy Act, 1883, an appeal from an order of the judge to whom bankruptcy business is assigned upon an application under sect. 5 of the Debtors Act, 1869, will now lie directly to the Court of Appeal, and not as formerly to a Divisional Court.

DIVISIONAL
COURT.

BEFORE
GROVE, J.
AND HUDDLE-
STON, B.

1884.

June 23.

IN this case the important question was raised whether, in the face of the alterations brought about by section 103 of the Bankruptcy Act, 1883 (whereby the jurisdiction and powers under section 5 of the Debtors Act, 1869, are now assigned to and exercised by the judge to whom bankruptcy business is assigned), an appeal would lie from an order of such judge upon an application under section 5 of the Debtors Act to a Divisional Court of the High Court of Justice, or directly to the Court of Appeal.

Section 103 of the Bankruptcy Act provides :—“(1) It shall be lawful for the Lord Chancellor by order to direct that the jurisdiction and powers under section 5 of the Debtors Act, 1869, now vested in the High Court, shall be assigned to and exercised by the judge to whom bankruptcy business is assigned. (2) It shall be

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lawful also for the Lord Chancellor in like manner to direct that the whole or any part of the said jurisdiction and powers shall be delegated to and exercised by the bankruptcy registrars of the High Court." An order had been made by the Lord Chancellor to this effect.

Further, by section 104, sub-section 2 (b), it is provided that "an appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal."

In the present case the question arose upon an application for an extension of the time allowed for appealing from an order recently made by Mr. Justice CAVE upon a debtor's summons under the provisions of section 5 of the Debtors Act, 1869.

H. Kisch for the judgment creditor.

Notwithstanding the coming into operation of the Bankruptcy Act, 1883, the practice is unchanged. Formerly an appeal lay from an order of the judge to a Divisional Court. I submit that that is still the proper course to be taken.

Wheeler, for the debtor, was not called upon.

GROVE, J. :

Judgment.

I am of opinion that in this case there is no right of appeal to this Court. Section 103 of the Bankruptcy Act provides that the Lord Chancellor may direct "that the jurisdiction and powers under section 5 of the Debtors Act, 1869, now vested in the High Court, shall be assigned to and exercised by the judge to whom bankruptcy business is assigned;" and, further, that such jurisdiction and powers may, in the same manner, be delegated to the bankruptcy registrars of the High Court. In pursuance of the provisions of that section the necessary order was made by the Lord Chancellor. It appears to me that the whole scope of the section is to make proceedings under the Debtors Act bankruptcy business. Such being the case, in my opinion, it cannot have been intended that an appeal should lie in matters under the Debtors Act to this Court, when in other bankruptcy matters no appeal to this Court is allowed.

HUDDLESTON, B. :

I am of the same opinion. Before the Bankruptcy Act, 1883, came into operation judgment debtor's summons were heard by a judge of the High Court, and then there was naturally an appeal from that judge to a Divisional Court. But now, by section 103 of the Bankruptcy Act, proceedings under the Debtors Act are bankruptcy business; and, by section 104, an appeal is given in bankruptcy matters to the Court of Appeal.

Application refused.

Solicitors: *Beyfus and Beyfus* for the judgment creditor.

J. A. White for the debtor.

1884.
IN RE
LASCELLES,
EX PARTE
GENESE.

PRACTICE.

IN RE SANDERS, EX PARTE WHINNEY.

Bankruptcy Act, 1883, section 4, sub-section 1 (g)—“Balance Order”—Winding-up of Company—“Final Judgment”—Bankruptcy Notice.

Held:—That a “balance order” made in the voluntary winding up of a company, whereby a contributory was ordered to pay in to the liquidator certain calls made in respect of the said company before the commencement of the winding-up, is not a “final judgment” within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, so as to support a bankruptcy notice.

DIVISIONAL
COURT.

BEFORE
MATHEW, J.
AND
CAVE, J.

1884.
June 25.

THIS was an appeal from an order of the Brighton County Court.

In this case the question was, whether a “balance order” under the Companies Acts, made in the voluntary winding up of a company, whereby a contributory was ordered to pay in to the liqui-

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WHIMNEY.

dator certain calls made in respect of the said company before the commencement of the winding up, was equivalent to a "final judgment," so as to support a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883.

Section 4 deals with the cases in which a debtor commits an act of bankruptcy: and sub-section 1 (g) provides—"If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

On June 21st, 1883, in connection with the voluntary winding up of the Britannia Fire Association, of which *John Sanders* was a contributory, a balance order was made by Vice-Chancellor BACON, on the application of the liquidator, whereby it was ordered that *Sanders* should pay to the liquidator, within seven days after service of the order upon him, the sum of 100*l.*, being the amount due from him in respect of a call of 1*l.* per share made by the directors of the association anterior to March 7th, 1881, the date of the resolution for winding up, and 9*l.* for interest thereon.

This order was served on September 5th, 1883, but no payment had been made, and on May 19th last, an application was made by the liquidator to the Brighton County Court, that a bankruptcy notice might be issued against *Sanders* in respect of the sum due.

This the registrar refused to grant, on the ground that a "final judgment," in accordance with the terms of the section, had not been obtained.

From this decision the liquidator now appealed.

L. Chubb :

This is an application *ex parte*. There have already been two decisions upon this sub-section. In *Ex parte Chinery*, *In re Chinery* (see *ante*, p. 31), where the question was whether a garnishee order absolute was a final judgment against the garnishee within the meaning of the section, it was held that it was not. And in *In re Cohen*, *Ex parte Schmitz* (see *ante*, p. 55), the Court of Appeal held that "the fact that an order has been made against a defendant requiring him to pay the taxed costs in an action within a specified time, does not constitute such order a final judgment within the section, so as to entitle the plaintiff, in the event of the defendant failing to comply with the terms of the order, to obtain a bankruptcy notice." Nevertheless, I submit that here there is a distinction to be drawn. In the present case, the order is practically equivalent to a final judgment. A balance order is a summary method of enforcing the payment of calls given to a liquidator by sections 101, 133 and 138, of the Companies Act, 1862. In *Ex parte Chinery*, the garnishee was not a debtor of the judgment creditor; but, in the present case, the liquidator represents the company, and it is his duty to get in all moneys due to them. A balance order can be enforced by execution. There is nothing in the Act to show that the words "final judgment," in sub-section (1) (g), are to be confined to mean a judgment in an action strictly so called.

MATHEW, J.:

I am of opinion that this application must be refused. An order Judgment of this kind doubtless bears a close analogy to a final judgment as contemplated by section 4, sub-section 1 (g); and there are also several enactments commencing with the statute 1 & 2 Vict. c. 110, s. 18, which give to orders the force of judgments. But upon a close examination of those enactments, I have come to the clear opinion that an order and a final judgment are different in their nature. The fact of its being said that an "order" may be enforced in the same manner as a "judgment" tends to show that an "order" is not a "judgment." Under these circumstances, even apart from the cases which have already been decided upon

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the section, and which Mr. *Chubb* has attempted to distinguish, I should say that the application ought to be refused.

CAVE, J.:

I am of the same opinion. In the case of *Ex parte Chinery, In re Chinery*, Lord Justice COTTON drew a careful distinction between a judgment and an order. In my opinion, the present case has already been decided by that case.

Application refused.

Solicitor: *Deane Chubb*.

CASES referred to:—

Ex parte Chinery, In re Chinery, ante, p. 31; L. R., 12 Q. B. D. 342; 50 L. T. 343.

In re Cohen, Ex parte Schmitz, ante, p. 55; L. R., 12 Q. B. D. 509.

DIVISIONAL COURT. IN RE WALKER & SON, EX PARTE NICKOLL & KNIGHT.

BEFORE
 MATHEW, J.
 AND
 CAVE, J.
 1884.
 June 25.

Bankruptcy Act, 1883, Section 4, sub-section 1 (h); *Bankruptcy Rules*, 1883, Rule 11—*Act of Bankruptcy—Notice of Suspension of Payment*.

Held:—That a notice given by a debtor under section 4, sub-section 1 (h), of the *Bankruptcy Act*, 1883, that he has suspended, or that he is about to suspend, payment of his debts, need not, in order to constitute an act of bankruptcy, be necessarily given in writing.

(COMPARE also the head note (2) in the case of *In re Friedlander, Ex parte Oastler & Co.*, *post*, 207.)

THIS was an appeal from a decision of the learned judge of the Norfolk County Court.

The facts of the case were as follows:

The debtors, Messrs. *Walker & Son*, formerly carried on business as seed-crushers at King's Lynn.

On December 17th, 1883, *Walker & Son* agreed to sell, and Messrs. *Nickoll & Knight* agreed to buy, at a price to be fixed by London quotations, all the linseed oil manufactured by them from that date up to December 31st, 1884.

It was also further agreed that the oil should be retained by Messrs. *Walker & Co.* upon their premises in tanks; and that upon it delivery orders should be issued upon which payment should be made by Messrs. *Nickoll & Knight*.

On March 13th last Messrs. *Walker & Co.* became bankrupt; and at the time of the bankruptcy 132 tons of oil were in certain tanks upon their premises, with regard to which delivery orders had been issued to Messrs. *Nickoll & Knight*. The official receiver, however, took possession of this oil, on the ground that it was in the possession of the debtors as reputed owners with the consent of the applicants.

An application made to the County Court for an order directing the receiver to deliver up the oil in question was refused.

From this refusal Messrs. *Nickoll & Knight* now appealed.

English Harrison (Cohen, Q.C. with him) for the appellants.

The argument which is put forward on behalf of the trustee is that the goods in question are within the order and disposition clauses of the Bankruptcy Act. But mere possession is not enough to raise a reputation of ownership. I shall prove that it is the established custom of the oil trade that purchasers leave oil upon the premises of the vendors at a rent. The case of *Ex parte Watkins, In re Couston*, L. R., 8 Ch. App. 520, clearly decides that where such a custom exists, the doctrine of reputed ownership is excluded, and the trustee is not entitled. In that case, at the time of the presentation of a petition for liquidation by arrangement, there were lying in the bonded warehouse of the debtors, who were wine and spirit merchants in Liverpool, certain butts of whiskey which they had sold to the appellant. The goods were left there for the convenience of the purchaser, to whom a delivery warrant had been given by the vendors, in which they stated that they held the goods to his order as warehousemen. The vendors did not carry on business as general warehousemen, but it was proved to be the usual custom of the wine and spirit trade in Liverpool for goods sold in bond to remain in the possession or under the control of the vendors, in the bonded warehouse in which they were at the time of sale, until they were required by the purchaser for use. It

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was held (reversing the decision of the chief judge) that the existence of a custom of this nature, shown to be well known among persons concerned in the wine and spirit trade, excluded the doctrine of reputed ownership, and that the goods did not pass to the trustee. [*Several affidavits were read by counsel to prove that it was the custom of the oil trade for purchasers to leave oil upon the premises of the vendors.*] But there is another point, even if I fail to establish the custom. The act of bankruptcy was the petition filed by the debtors on March 13th; but on February 28th Messrs. *Nickolls & Knight* sent one of their clerks to make a demand for the goods, and we are, therefore, out of the order and disposition clause. When this point was raised in the County Court, it was met by section 43 of the Bankruptcy Act, 1883, which provides that "the bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor." It was proposed, on behalf of the receiver, to prove an act of bankruptcy committed by the debtors on February 26th. It was said that on that date the debtors informed one of their creditors, named *Game*, that they intended to suspend payment. To begin with, there is a conflict of evidence upon this conversation, as the affidavit of *Game* states that it took place, while the affidavit of the debtor denies it *in toto*. [*Counsel here read the affidavits.*] But in any case, I contend, that a notice of this kind cannot be given in a mere loose conversation. Section 4, subsection 1 (h), of the Bankruptcy Act, 1883, provides that a debtor commits an act of bankruptcy if such debtor "gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." But by Rule 11 of the Bank-

ruptcy Rules, 1883, "all notices required by the Act or these Rules shall be in writing, unless these Rules otherwise provide, or the Court shall in any particular case otherwise order." I contend that this provision applies to the notice that a debtor is about to suspend payment of his debts. At any rate, such notice must be definite.

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Winslow, Q.C. (Yate-Lee with him) for the trustee :

If a custom of the kind suggested exists, it must be one well known to ordinary creditors and not merely to persons in the trade. In the case of *In re Hill*, cited in a note to the case of *Ex parte Powell, In re Matthews* (L. R., 1 Ch. Div. at page 503), Lord Justice MELLISH, in delivering the judgment of the Court, said : "that the law on the subject had been settled by *Ex parte Watkins* (L. R., 8 Ch. 520). . . . The custom must, however, be well proved, and shown to be known not only to persons in the same trade, but to others who were likely to be creditors." [*A number of affidavits were read by counsel in denial of the alleged custom.*] Moreover, the object of the new Act is especially for the protection of creditors.

English Harrison in reply.

MATHEW, J. :

I am of opinion that the order of the County Court judge must Judgment. be upheld. The County Court judge decided that these 132 tons of oil, which were on the premises of the debtors at the time of the bankruptcy, were within the order and disposition of the bankrupts, and as such should pass to the official receiver as trustee. I will deal first with the point which has been raised, that possession was terminated by a demand which, it has been stated, was made by Messrs. *Nickoll & Knight*, on February 28th, before the bankruptcy took place. In opposition to this, evidence was given of an act of bankruptcy committed on February 26th, when the debtors, it is alleged, informed Mr. *Game*, one of their creditors, that they intended to suspend payment. There is, it is true, a conflict of evidence upon this point, but I am bound to say that in my opinion the probabilities are in favour of Mr. *Game's* statement. But it

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has been urged that this statement, even if it was made, was merely a loose conversation, and that, since by Rule 11 of the Bankruptcy Rules, 1883, it is provided that all notices shall be in writing, a notice by a debtor that he intends to suspend payment of his debts in order to be effectual must be a written one. On this point I decide against Mr. *Harrison*, and I do not think it necessary to give my reasons for so doing. Then there comes the other question, whether the goods in question were in the order and disposition of the bankrupt according to the section of the Act. A large number of affidavits were read by Mr. *Harrison*, in order to prove the existence of a custom in the oil trade for purchasers to leave the oil upon the premises of the vendors, and it was argued that any one connected with the oil trade would be perfectly well aware that possession did not mean ownership. But Mr. *Winslow*, on behalf of the trustee, produced an equal number of affidavits exactly to the contrary effect. It is very easy to allege a custom, and it can only be tested by instances or by its reasonable character. In the present case no specific instances have been adduced, and I cannot see any cause to justify its existence. In my opinion everything tends to point to the fact that this was a peculiar contract, and I am clearly of opinion that the order made by the County Court judge in favour of the trustee was a right order.

CAVE, J. :

I am of the same opinion. With regard to that part of the judgment just delivered which refers to the act of bankruptcy I have nothing to add. But with regard to the alleged custom there are several circumstances which lead me to believe that what was done in this case was done by special arrangement. The simple question is, Is this part of the ordinary business of a seed-crusher? Now, in the first place, not a single witness has ventured to swear that he has ever followed it in the ordinary course of trade. Then, if the custom was a general one, I should have thought that the warrants would be in a familiar form, and at any rate well known to the trade, yet only one witness amongst those brought forward for the appellants makes any mention of these warrants. In addition to this, I am confirmed in my opinion by the words used by the appellants themselves in a letter written by them to the bankrupts

on November 20th. In that letter the appellants say, "and to provide warrants in a form to be approved by our bankers and solicitors." All these circumstances tend much to confirm me in my opinion that the arrangement was a special one, and that the decision of the County Court judge was right.

Appeal dismissed.

Solicitors: *Mercer & Mercer* for the appellants.
S. Cozens-Hardy for the official receiver.

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DIVISIONAL
 COURT.

Bankruptcy Act, 1883, Section 97, Sub-section (2), and Section 104; Bankruptcy Rules, 1883, Rules 16 and 17.

BEFORE
 MATHEW, J.
 & CAVE, J.

*Transfer of Proceedings—Refusal of County Court Judge to grant Certificate—
 Appeal.*

1884.
 June 25 & 26.

Held:—(1) That where the judge of a County Court refuses to grant a certificate under Rule 16 of the Bankruptcy Rules, 1883, that "in his opinion a bankruptcy proceeding would be more advantageously conducted in some other Court," such refusal is equivalent to an order to retain the proceedings, and from it an appeal will lie.

(2) If the Court to which the appeal is made should be of opinion that such certificate ought to have been granted, it will not refer the matter back to the County Court, but will grant the certificate itself.

THIS was an appeal from a decision of the learned judge of the County Court at Lynn, by which he refused to grant an order for the transfer of certain bankruptcy proceedings to London under section 97 of the Bankruptcy Act, 1883.

Section 97, sub-section (2), provides that "any proceedings in bankruptcy may at any time and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one Court to another Court, or may by the like authority be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced." And by Rule 16 of the

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Bankruptcy Rules, 1883, "where the judge of a County Court, or the judge or a registrar of the High Court, certifies that, in his opinion, a bankruptcy proceeding would be more advantageously conducted in some other Court, the registrar shall, if the opinion is certified before the first meeting of creditors, transmit the certificate to the official receiver, who shall lay the same before such meeting; and, if it has been certified after such meeting, he shall transmit a copy of such certified opinion to the trustee, if there be one, and if not, to the official receiver, who shall thereupon summon a meeting of creditors to consider the same." And by Rule 17, "If within seven days after the first meeting, or in any other case within fourteen days after transmitting such notice to the official receiver or trustee, no resolution of the creditors objecting to such transfer shall be received by the Court through the registrar, the transfer may be made accordingly; but if the creditors have so objected the transfer shall not be made."

In the present case the County Court judge had refused to grant a certificate for the transfer, on the ground that the appellants were estopped from applying for such transfer, by reason of certain correspondence which had taken place between the solicitors of the appellants and the solicitors of other creditors who opposed the proposed transfer.

The main question in the case was entirely one of fact, which it is unnecessary to notice.

On the second day of the hearing, however, an objection was raised by counsel that from such a refusal to direct a transfer there was no appeal.

E. Cooper Willis, Q.C. (Bray with him) for the appellant.

Francis Turner for the debtor's bankers and largest creditor.

Firth for certain creditors at Lynn.

Firth :

I take an objection that no appeal can lie from the refusal of the County Court judge to direct a transfer. Section 104 of the Bankruptcy Act, 1883, provides that "orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to

appeal." And "an appeal shall lie from the order of a County Court." But I contend that this is not an appealable order within section 104. It was a mere exercise of discretion on the part of the County Court judge. There can only be an appeal from an "order in a bankruptcy matter," which the granting or refusing of a certificate of this kind is not.

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MATHEW, J. (after stating that, although the Court was satisfied Judgment. that the County Court judge had taken every care in determining the case, nevertheless they felt bound to differ with his decision, and must order a transfer) said :

No objection to the jurisdiction was raised until the arguments were almost concluded. It has now been argued by Mr. *Firth*, however, that there is no right of appeal from the refusal of the County Court judge to direct a transfer, even if that refusal is wrong. I cannot agree with that contention. In my opinion, such a refusal is equivalent to an order to retain the proceedings under section 97, sub-section (2). From such an order an appeal lies. The learned judge absolutely refused to exercise his discretion, and this is an appeal, not against the exercise of the discretion of the County Court judge, but against his refusal to exercise the discretion which he might have exercised. It places us in such a position, that we have to make an order on the merits as if we were the Court of first instance. Such being the case, we are of opinion that a *prima facie* case has been made out, that the proceedings in question can be conducted more advantageously in London than in the country, and the appeal must be allowed.

CAVE, J. :

I am of the same opinion. The matter is one in which the Court has a wide jurisdiction, and this cannot be interfered with by any agreements between solicitors, so as to prevent the judge from exercising his discretion in the way he might think best for the creditors generally.

Order of transfer made.

Solicitors: *F. W. Mount* for the appellants.

Duffield & Broughty for the debtors.

Ginn & Matthew for the debtors' bankers.

DIVISIONAL IN RE STRAND, EX PARTE THE BOARD OF TRADE AND COURT.
THE OFFICIAL RECEIVER.

BEFORE
MATHEW, J.
& CAVE, J.

1884.

June 26.

Bankruptcy Act, 1883, Section 105, Sub-section (1); Bankruptcy Rules, 1883, Rules 100 and 104.

Costs of Public Examination and Second Meeting of Creditors—Taxation—Proceedings in Court.

Held :—(1) That the words “any proceeding in Court” in section 105, sub-section (1), of the Bankruptcy Act, 1883, do not include a second meeting of the creditors under a bankruptcy petition, summoned for the purpose of confirming a scheme of arrangement of the debtor’s affairs accepted at the first meeting.

(2) That the Court has in consequence no power to order the costs of the petitioner incidental to such second meeting to be paid out of the debtor’s estate.

(3) But the words do include the public examination of the debtor, and the Court has power to order costs incidental to such public examination to be paid out of the estate.

THIS was an appeal on behalf of the Board of Trade against an order made in the County Court at Canterbury.

The order appealed against directed that the official receiver should pay out of the assets the costs properly incurred by one *Norman*, as the solicitor of the debtor *Strand*, in attending the public examination and the second meeting of creditors of the said debtor.

On January 23rd, 1884, the debtor *R. F. Strand* presented a bankruptcy petition in the Canterbury County Court, and a receiving order was made against him.

On February 6th the first meeting of creditors was held, when a resolution was passed unanimously, accepting a scheme of arrangement of the debtor’s affairs, which had been prepared by the debtor’s solicitor on his behalf, who attended the meeting; and this scheme was approved by the official receiver.

On February 8th the debtor’s public examination was held, and on February 15th the second meeting of creditors, for the purpose of confirming the scheme, which Mr. *Norman* also attended.

At this meeting, however, the official receiver stated that he had now received instructions from the Board of Trade to oppose

the scheme, and the debtor in consequence was adjudicated bankrupt.

The debtor's solicitor subsequently carried in for taxation his bill of costs, including the charges in connection with the two meetings of creditors and the public examination.

These costs were allowed by the registrar; but upon a review of the taxation by a bankruptcy master of the High Court, required by the Board of Trade, under Rule 104 of the Bankruptcy Rules, 1883, they were disallowed, on the ground that no order had been made by the Court under Rule 100 specifically allowing such costs, and that the order of the registrar on taxation was not an order of the Court.

On a further application to the County Court, however, that the official receiver might be directed to pay to the debtor's solicitor the costs in question, the learned judge made the desired order.

From this order the Board of Trade and the Official Receiver now appealed.

M. D. Chalmers for the Board of Trade and the official receiver.

Winslow, Q.C. (*J. Linklater* with him) for the respondent.

A preliminary objection was raised by *Mr. Winslow* upon the ground that the order had originally been made on behalf of the debtor, and was headed "Ex parte the debtor," while the notice of appeal was addressed, not to the debtor, but to the solicitor by name.

At the suggestion of the Court, however, an arrangement was come to, and it was agreed that the notice of appeal should be forthwith amended.

M. D. Chalmers :

Mr. Norman, the solicitor in question, was employed on behalf of the debtor without any authority from the official receiver. To begin with, I submit that in all cases of this kind the sanction of the official receiver ought to be obtained. Notwithstanding the want of authority, however, the registrar allowed the costs of *Mr. Norman* in attending the public examination of the debtor, and also the second meeting of creditors. The Board of Trade

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thereupon caused a review of taxation to be made in accordance with Rule 104 of the Bankruptcy Rules, 1883, which provides that "The Board of Trade may require the taxation of the bills of costs, charges, fees or disbursements of any solicitor, accountant, auctioneer, manager, or other person, where the taxation has been made by a registrar of a County Court to be reviewed by a bankruptcy taxing master of the High Court, and may appear on the review of such taxation; and where any such review is directed, the registrar of the County Court shall forward to such master of the High Court the bill which is required to be reviewed, and such master shall review such taxation. If upon the review the bill is allowed at a lower sum than that allowed by the registrar of the County Court, the amount disallowed shall be repaid to the trustee." Upon the review the taxing master disallowed all costs after the first meeting. But the County Court judge subsequently made an order allowing these costs. Now I contend that the order so made amounted in effect to a review of the decision of the taxing master, and as such was outside the jurisdiction of the learned judge.

[CAVE, J.: Is that quite correct? It seems to me that the original order did not extend to these costs, and therefore the taxing master did not allow them. Then what was done was this: A substantive order was made by the County Court judge which did include them.]

In that case I contend that there was no jurisdiction to make the order. I submit, again, that the sanction of the official receiver ought to have been obtained to the employment of the solicitor. It is a question whether the debtor at any rate after the first meeting is entitled to go to the expense of employing a solicitor. The services of a solicitor are not essential.

[MATHEW, J.: The judge may be of opinion that the debtor ought to have one.]

[CAVE, J.: It is clearly intended that a solicitor should be employed in certain cases, from the fact that the Court has a discretion in the matter.]

Yes, and where the services of a solicitor are necessary, the

official receiver will authorize the employment, but his sanction ought to be applied for. Further than this, it is true that by section 105 of the Act, "the costs of and incidental to any proceedings in Court under this Act shall be in the discretion of the Court;" and by that section jurisdiction over costs is given to the Court. But that provision only applies to "proceedings in Court." The second meeting of creditors cannot be included under those words.

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[MATHEW, J. : We should like to hear you, Mr. *Winslow*, upon the words "of and incidental to any proceeding in Court." That appears to be your only difficulty.]

Winslow, Q.C. :

The public examination of a debtor is beyond doubt a proceeding in Court. In the same manner I submit that the meeting of creditors is "incidental to" the proceedings in Court. As a matter of fact, all that takes place under a petition is really a proceeding in Court. In the present case, a scheme of arrangement was proposed, and this would have been adopted, but the Board of Trade appear to object to any scheme of arrangement in small bankruptcies. In order to draw a scheme of arrangement properly the assistance of a solicitor is essential. The Court has a general power to allow costs. (*In re Mew, Ex parte Pearce*, L. R., 2 Ch. Div. 320, was referred to.)

M. D. Chalmers in reply.

MATHEW, J. :

In this case a technical objection was raised, upon the ground that Judgment. Mr. *Norman*, the solicitor, had been made a respondent, and the debtor omitted. That objection was afterwards removed, however, by an amendment of the notice of appeal; and it was decided that the question should be decided upon the construction of the Bankruptcy Act, 1883, as regards the question of jurisdiction. The present appeal is an appeal against an order made by the County Court judge at Canterbury, directing the official receiver of that Court to pay out of the assets the costs of Mr. *Norman*, incurred by him in attending, in the capacity of solicitor for the debtor, the debtor's public examination, and the second meeting

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of creditors. It has been argued that these costs were disallowed by the taxing master. In my opinion, such was not the case. It appears to me that when the matter was brought before the taxing master, no order allowing these costs had been made by the County Court. But the County Court judge subsequently made an order allowing these costs. Then comes the question, Had the County Court judge jurisdiction to make such order? The section to be considered is section 105, which provides that "(1) Subject to the provisions of this Act and to general rules, the costs of and incidental to any proceeding in Court under this Act shall be in the discretion of the Court: Provided that where any issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the judge before whom such issue is tried shall otherwise order." Now, as far as the public examination of the debtor is concerned, there can be no doubt whatever that there was jurisdiction. But, with regard to the second meeting, it is necessary to look far more closely at the wording of the section. The particular words to which attention must be given are "the costs of and incidental to any proceeding in Court." Now, the second meeting was not a proceeding in Court; and, in my opinion, it was not incidental to any proceeding in Court within the meaning of the section. It was a meeting called to consider the confirmation of a scheme of arrangement, which had been before submitted to the first meeting. I am of opinion, therefore, that there was no jurisdiction to make that part of the order relating to the second meeting of creditors; and, in doing so, the County Court judge was wrong.

CAVE, J., concurred.

Solicitors: *The Solicitor to the Board of Trade* for the Board of Trade.

A. Norman for the respondent.

In connection with the above case, the following letter was afterwards published by Sir T. H. Farrer, Permanent Secretary to the Board of Trade:—

"SIR,—The attention of the Board of Trade having been called to the report . . . of a case before the Divisional Court of the Queen's Bench

Division, *Ex parte The Board of Trade*, in which it is stated that the official receiver had informed a meeting of creditors that the 'Board of Trade objected to any scheme of arrangement in small bankruptcies,' I am directed by the Board of Trade to state that there is no foundation for the statement in question, and that the Board of Trade have never entertained or expressed any such objections. The official receiver concerned, also assures them that he never made any such statement. When the matter was mentioned in the Divisional Court, it was at once denied by Mr. Chalmers on behalf of the Board of Trade.

"Board of Trade,

T. H. FARRER.

"Whitehall Gardens,

"July 10th."

To this the learned editor of the "Solicitors' Journal," in which paper the above letter was published, appends the following note:—

"[We are glad to find that no such objections have been expressed by the Board of Trade. It was, however, positively asserted in Court by the counsel for the debtor that the official receiver had informed the creditors at their second meeting that he had received instructions from the Board to that effect, and this assertion was justified by an affidavit made by a person who was present at the meeting. Our reporter did not understand Mr. Chalmers as actually denying that such instructions had been given by the Board, but only as saying that he had never heard of them. The letter of Sir T. H. Farrer, however, proves what the official receiver said at the meeting must have been misunderstood.]"

IN RE WOODALL, EX PARTE WOODALL.

Bankruptcy Act, 1883, Section 4, Sub-section 1 (g).

Bankruptcy Notice served by Executrix of Judgment Creditor—Rules of the Supreme Court, 1883, Order XLII. Rule 23.

*Held:—*That a creditor in order to serve a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, must be entitled and in a position to issue execution: and that in consequence a bankruptcy notice against a judgment debtor cannot be issued by the executor of a creditor who has obtained final judgment, unless such executor has first obtained leave from the Court to issue execution on the judgment under Rule 23 of Order XLII. of the Rules of the Supreme Court, 1883.

THIS was an appeal on behalf of the debtor *W. Woodall*, to set aside a receiving order made against him by Mr. Registrar *Pepys* on May 29th last, on the application of *Martha Houlston*.

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EX PARTE
THE BOARD OF
TRADE &
THE OFFICIAL
RECEIVER.

COURT OF
APPEAL.

BEFORE
BAGGALLAY,
L. J.,
COTTON, L. J.,
LINDLEY, L. J.

1884.

June 27.

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IN RE
WOODALL,
EX PARTE
WOODALL.

The facts of the case were as follows :

The petitioning creditor was the sole executrix under the will of the late William *Houlston*, deceased, who died on the 20th July, 1882. On 11th November, 1879, Mr. *Houlston* issued a writ against the debtor for 333*l.* 3*s.* 2*d.* principal and interest due to him from the debtor on his promissory note of the 1st April, 1879, for 323*l.* 5*s.* payable on demand, and on 6th December, 1879, Mr. *Houlston* obtained final judgment against the debtor for 334*l.* 5*s.* 4*d.* debt, and 7*l.* 17*s.* costs. Mr. *Houlston* issued execution upon such judgment, and recovered part of the amount due thereon, and on the 22nd March, 1880, he issued a debtor's summons under the Bankruptcy Act, 1869, for the balance of principal and interest then due on such judgment, viz. : 246*l.* 3*s.* 3*d.* ; and on the 19th of May, 1880, presented a petition in the London Bankruptcy Court, founded upon such debtor's summons.

When the petition came on to be heard on the 11th June, 1880, it was adjourned at the request of the debtor until 9th July, 1880, with the view of his making some arrangement for settlement of the debt. On such adjournment it was further adjourned until 30th July, 1880, when it was adjourned *sine die*, with liberty for either party to apply. Such adjournments led to an arrangement between the parties, which was embodied in a deed of covenant dated 3rd July, 1880.

Under this deed, however, the debtor had only paid on account of the debt sums amounting together to about 100*l.*, leaving something like 150*l.* due for principal at Mr. *Houlston's* death, and a debtor summons under the Bankruptcy Act, 1869, was issued in December, 1883, but in consequence of the promises of the debtor the matter was allowed to stand over.

On April 10th, 1884, no payment having been made, a bankruptcy notice was issued by Mrs. *Houlston* for principal and interest of the debt, amounting to 160*l.*, and a petition was filed and served on May 12th, 1884.

On May 26th, the debtor served notice of his intention to oppose the petition, alleging amongst other grounds (4) "That the judgment mentioned in the petition was obtained by one William *Houlston*, against me in the year 1879, which has become abated, and no proceedings have been taken to revive the same or to obtain

the benefit thereof by the petitioning creditor, and therefore the same is not a good petitioning creditor's debt.

On May 29th, however, the learned registrar made the receiving order as prayed, and from this decision the debtor now appealed.

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IN RE
WOODALL,
EX PARTE
WOODALL.

T. Brett (Herbert Reed with him) for the appellant.

No act of bankruptcy has been committed, and therefore no receiving order ought to have been made. Section 4, subsection 1 (g), of the Bankruptcy Act, 1883, provides in effect that "If a creditor has obtained a final judgment against a debtor for any amount, and execution thereon not having been stayed, has served on him * * * a bankruptcy notice under the Act requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice * * * either comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set-off, or cross demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained," then such debtor commits an act of bankruptcy. First, I submit that the Act speaks not of a balance of a judgment, but of a judgment. But I say further, that an executrix cannot take action without renewing the judgment. Rule 23 of Order XLII. of the Rules of the Supreme Court, 1883, provides that "In the following cases, viz.: (a) where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution; * * * the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. Any such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just."

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In *Baynard v. Simmonds*, 5 E. & B. 59, it was held that "an executor of a judgment creditor is not entitled under section 61 of the Common Law Procedure Act, 1854, to attach a debt due to the judgment debtor before he has made himself a party to the judgment." And, in that case, Lord Campbell said, "the enactment contains a useful extension of the remedies of the judgment creditor, but we must not go beyond what the Legislature has said."

Further, in *Boynton v. Boynton*, L. R., 4 H. L. Cas. 733, it was decided that "an order, under the modern practice, allowing an executor to continue the proceedings in an action instituted by his testator, which order has been obtained by him after a judgment in favour of his testator, and after notice of an appeal against that judgment, is equivalent to the old order for revivor, and subjects him to the same liabilities. He becomes in effect a substantive party to the suit, and is personally liable to costs." Here the executrix had not obtained the leave of the Court under Rule 23 of Order XLII. : she could not issue execution. And I contend that the only party to issue a bankruptcy notice under section 4, sub-section 2 (g), is the party entitled to issue execution. The Court is inclined to use this part of the Act with great strictness (see *Ex parte Chinery*, *In re Chinery*, ante, p. 31 : and *In re Cohen*, *Ex parte Schmitz*, ante, p. 55). I ask your Lordships to construe the section most strictly. The executrix was not a party to the record : she could not issue execution. Therefore, I contend, she could not put into motion the bankruptcy proceedings.

Sidney Woolf for the petitioning creditor.

If section 4, sub-section 2 (g), is read thus strictly no executor could take proceedings. The object of Rule 23, Order XLII., is when a creditor requires to issue execution. But there is no reason why the same construction should be put upon section 4, sub-section 2 (g). The case of *Ex parte Tanner*, 1 Mont. & M. 292, shows that "if a petitioning creditor dies before adjudication, his executors may carry on the proceedings." Further, if the debtor was made bankrupt by another creditor, this executrix could clearly make an affidavit of her debt.

[COTTON, L. J. : The argument against you is that you are not the creditor who has obtained the final judgment. You contend

that the word creditor in section 4, sub-section 1 (g) should read "creditor or his executor" has served a bankruptcy notice, &c.]

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IN RE
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Under Rule 23 of Order XLII. it would not make me a party to the judgment; it would simply give me leave to issue execution, it would not make me the creditor who has obtained judgment. It will not advance my position under section 4, sub-section 1 (g). If Order XLII. would make me the judgment creditor the argument against me would be very strong. But it does not do so. An executor or administrator represents the testator always. I submit that it is not straining the meaning of the Act to say that the word "creditor" is equivalent to "creditor or his representatives." It is straining it to understand "creditor" as the person who can issue execution.

BAGGALLAY, J.:

This is an appeal to set aside a receiving order made on Judgment. May 29th last against *Woodall*. The act of bankruptcy was in accordance with the terms of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883. The question is, whether the party who served the bankruptcy notice was a creditor within this section. The final judgment was obtained by one *Houlston*, who died. The petitioning creditor was his executrix; and the receiving order was made on the assumption that she, as executrix, could stand in the place of the creditor. The objection is, that inasmuch as the petitioner was not the person who obtained final judgment, but the executrix, it was necessary that she should have obtained leave to issue execution under Rule 23 of Order XLII. It was contended, on the other hand, that in section 4, sub-section 1 (g), the word "creditor" is equivalent to "creditor or his representatives," whoever they may be. If it were not for the words "execution thereon not having been stayed," which are inserted in section 4, sub-section 1 (g), I think the latter argument would be an extremely strong one. But, looking at those words, I have come to the opinion that the provision clearly intends a person who is entitled and in a position to issue execution. The original creditor was in that position. But if an applicant for a bankruptcy notice is the executor of the original creditor, he is not in that position

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until he has obtained leave to issue execution under Order XLII. Here the executrix had not secured the required permission, and the appeal must therefore be allowed.

COTTON, L. J. :

I am of the same opinion. The act of bankruptcy in question is a statutory one, and it is necessary to look closely at the terms of section 4, sub-section 1 (g). The creditor must do two things : (1) he must obtain a final judgment ; (2) he must serve a notice on the debtor. The same person must do both. Then regard must also be had to the words "execution thereon not having been stayed." The person who has done the two things must be in a position to issue execution. In the present case the executrix had not obtained final judgment, and she was not in a position to issue execution. But she could, under Order XLII., obtain leave to do so. The proper course is for the executrix to get an order, which would put her in the position to say she can issue execution. She will then, in my opinion, be a creditor within the meaning of section 4, sub-section 1 (g), and will be entitled to serve the notice. As it is, the provisions of the section have not been complied with, and the appeal must be allowed.

LINDLEY, L. J. :

I am of the same opinion. Until an executor has obtained leave to issue execution under Order XLII., it is impossible for such executor to say he has complied with the provisions of section 4, sub-section 1 (g). The executor has not obtained final judgment ; but, by doing something else, he may put himself in the same position as a creditor who has obtained final judgment. If he has not done so, then the words "and execution thereon not having been stayed," show clearly the creditor is intended to be a creditor who is in the position to issue execution. The appeal must be allowed with costs.

Appeal allowed.

Solicitors : *T. R. Watson* for the appellant.
W. R. Francis for the respondent.

CASES relied upon or referred to :—

Baynard v. Simmonds, 5 E. & B. 59.

Boynton v. Boynton, L. R., 4 H. L. Cas. 733.

Ex parte Chinery, *In re Chinery*, see *ante*, p. 31.

In re Cohen, *Ex parte Schmitz*, see *ante*, p. 55.

Ex parte Tanner, 1 Mont. & M. 292.

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IN RE
WOODALL,
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IN RE FRIEDLANDER, EX PARTE OASTLER & CO.

COURT OF
APPEAL.

Bankruptcy Act, 1883, Section 4, Sub-section 1 (h).

Act of Bankruptcy—Notice of Suspension of Payment of Debts.

BEFORE
BAGGALLAY,
L. J.,
COTTON, L. J.,
LINDLEY, L. J.

1884.

July 4.

Held :—(1) That where a verbal statement was made by a debtor to one of his creditors that he was unable to pay his debts in full, such statement did not amount to a notice by the debtor “that he has suspended, or that he is about to suspend, payment of his debts,” so as to constitute an act of bankruptcy under section 4, sub-section 1 (h), of the Bankruptcy Act, 1883.

(2) That although such notice need not in order to constitute an act of bankruptcy be necessarily given in writing (see *In re Walker & Son*, *Ex parte Nickoll & Knight*, *ante*, p. 188), still if it is given verbally it must be a formal notice, and given with the intention of giving such notice.

THIS was an appeal from an order of Mr. Registrar *Brougham* rescinding a receiving order previously made by himself against the debtors, upon a bankruptcy petition presented by Messrs. *Oastler, Palmer & Co.*, on April 19th last.

The debtors were leather merchants, carrying on business as *Friedlander & Co.*, in London and Paris, the firm consisting of *B. Friedlander*, *A. M. Elsdale*, and *E. Roth*.

The act of bankruptcy alleged in the petition was that provided for in section 4, sub-section 1 (h), of the Bankruptcy Act, 1883, by which a debtor commits an act of bankruptcy “if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts,” in support of which the affidavit of one *F. Mortimer* was read, in the terms stated below.

The receiving order was discharged by the registrar on the ground that as the act of bankruptcy was committed in Paris, and

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FRIEDLANDER,
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OASTLER & Co. there were bankruptcy proceedings existing there, a discretion was given to the Court whether it should exercise its jurisdiction or not.

From this decision Messrs. *Oastler, Palmer & Co.* now appealed.

R. Vaughan Williams for the appellants.

The appeal raises the question as to what constitutes an act of bankruptcy under section 4, sub-section 1 (h), of the Bankruptcy Act, 1883. In the present case, the debtors carry on business in London and Paris, and the act of bankruptcy is said to have been committed in a conversation in Paris. Then comes the question, Can it be committed in Paris? In support of the allegation there is an affidavit of one *F. Mortimer*, a creditor of the debtors. [*This affidavit of Mortimer was here read to the following effect:—That in April last he was instructed by the English creditors of the debtors to go to Paris, and went there on the 16th of that month—that by appointment he saw Friedlander and Elsdale, who were then in Paris, and together with a solicitor had a conversation with them—that Friedlander stated in the presence of Elsdale that he had started in business six or seven years ago without capital, and that he was unable to pay the debts of the firm, but that he offered twenty per cent. dividend—that Friedlander further said, that he expected to obtain assistance from his brother-in-law, but this would not be until some arrangement with his creditors had been made, and that if the offer was accepted, he should consider the balance to be a debt of honour, and would pay it in full afterwards.*]

[BAGGALLAY, L. J.: Where are the words that he is “about to suspend.” Even if that conversation took place does it come within section 4, sub-section 1 (h)?]

There is no decision against me. The registrar said it would be sufficient if the conversation had occurred in England and not in Paris. The notice in section 4, sub-section 1 (h), may be an oral notice. I submit that a case may come within the section if a debtor does not use the word “suspend.” The intention of the Legislature is to get positive evidence that the debtor’s position is

this:—that his goods ought to be distributed amongst his creditors. The debtor, addressing a creditor in a matter not concerning him alone, but the whole body of creditors, suggests that all the creditors shall forego 80 per cent. I submit that that is an intimation to the creditors that he cannot pay 100 per cent. He intends only to pay 20 per cent. He also says he is “unable to pay the debts of the firm.” The intention of section 4, sub-section 1 (h), was that when a debtor said he was unable to pay his debts, even if he did not do it in a form proper to be used when he desired to have his affairs administered in bankruptcy, that he should be compelled to have them administered in bankruptcy whether he liked it or not.

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[COTTON, L. J.: A creditor who says he cannot pay in full may not intend to suspend payment.]

The debtor here says, will the creditors take 20 per cent., because I am unable to pay the debts of the firm. The debtor intended his creditors to understand that he must limit his payment to 20 per cent., and that would not come out of his own pocket. It is a reasonable inference that he meant the creditors to understand that as to 80 per cent. he should suspend payment.

E. Cooper Willis, Q.C. (Israel Davis with him), for the respondent, were not called on.

BAGGALLAY, L. J.:

In this case the alleged act of bankruptcy was that provided for Judgment. by section 4, sub-section 1 (h), of the Bankruptcy Act, 1883, viz.: “If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.” The affidavit, read in support of this intention to suspend payment, alleges that one bankrupt in the presence of the other stated to a creditor that he was unable to pay the debts of the firm but offered 20 per cent. dividend, and that he expected assistance from his brother if an arrangement could be arrived at. Is this such notice as to constitute such an act of bankruptcy as is contemplated by section 4, sub-section 1 (h)? I do not so view it. It is not equivalent to section 4, sub-section 1 (f), where a debtor commits an act of bankruptcy, “if he files in the Court a declaration of his

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IN RE
FRIEDLANDER,
EX PARTE
CASTLER & Co.

inability to pay his debts"—that declaration must be filed. I am clearly of opinion that the alleged notice given was not such a notice as the Act contemplates, and the appeal must be dismissed.

COTTON, L. J. :

I am of the same opinion. All the circumstances of the case must be taken into consideration, and it is a question whether this would be within the section even if the words were different. The debtor was interviewed. He did not say that he would stop payment. He only said, "If you will arrange I will give 20 per cent., as the assets are not sufficient to pay in full." To my mind there is a great difference where a debtor says, "If all my assets are distributed they will not realize twenty shillings in the pound!" and where he says, "I cannot pay my debts: you must take your own course."

LINDLEY, L. J. :

I am of the same opinion. First, as to the words "gives notice." That does not mean mere casual talk; it must be something formal, and given with the intention of giving notice. I do not know that this was a formal notice. If so, it certainly was not such a notice as is required by the Act. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Lousada & Emmanuel* for the appellants.
Atkinson & Dresser for the respondents.

PRACTICE.**IN RE H. F. MARGETTS, EX PARTE THE BOARD OF TRADE.**

BEFORE
MR. JUSTICE
CAYE.
1884.
July 7.

*Bankruptcy Act, 1883, Section 102, Sub-section (5); and Section 162,
Sub-section 2 (b).*

Application on behalf of the Board of Trade for an order of the Court to enforce an order previously made by the Board of Trade upon a trustee to furnish accounts. Conditional order not granted.

THIS was an application by the Board of Trade under section 102, sub-section (5), of the Bankruptcy Act, 1883, for an order confirming an order previously made by the Board of Trade under section 162, sub-section 2 (b), of the same Act.

Section 102, sub-section (5), provides that "where default is made by a trustee, debtor or other person in obeying any order or direction given by the Board of Trade, or by an official receiver or any other officer of the Board of Trade, under any power conferred by this Act, the Court may, on the application of the Board of Trade, or an official receiver or other duly authorized person, order such defaulting trustee, debtor or person to comply with the order or direction so given; and the Court may also, if it shall think fit, upon any such application, make an immediate order for the committal of such defaulting trustee, debtor or other person; provided that the power given by this sub-section shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default."

And by section 162, sub-section 2 (a), "where, after the passing of this Act, any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or other person empowered to collect, receive or distribute any funds or dividends under any Act of Parliament mentioned in the Fourth Schedule, or any petition, resolution, deed or other proceeding under or in pursuance of any such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or

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 IN RE H. F.
 MARGETTS,
 EX PARTE THE
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 TRADE.

distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish such trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof." And (b) "The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed or other proceeding as aforesaid, and may direct and enforce an audit of the account."

The debtor, *H. F. Margetts*, who carried on business as an hotel keeper at Croydon, filed his petition for liquidation in December, 1879, and one *W. P. Grout*, of Canal Terrace, Camden Town, was appointed trustee under the proceedings.

Acting upon a communication received from a creditor that the trustee had undistributed funds and dividends remaining in his hands, the Board of Trade had required him to furnish a verified account of his receipts and payments.

With that order, however, *Grout* had failed to comply, and application was now made that it might be enforced by the Court.

M. D. Chalmers for the Board of Trade (after reading the affidavit of *J. Smith*, Inspector-General in Bankruptcy, in support of the application) said:—

The Board of Trade made the order on March 4th last, and it was served personally. It is now July 7th, and no notice has been taken of it. I ask for an order of committal, but not to be drawn up if accounts rendered within seven days.

CAVE, J.:

You are entitled to an order to comply with the order of the Board of Trade, but you must come again to ask for a committal. It is not the practice of the Court to make a conditional order. The order to-day must be one directing compliance with the order of the Board of Trade within seven days of the service of my order.

M. D. Chalmers: Is personal service necessary?

CAVE, J.:

It is the practice, and I think in the face of a possible future committal, it should be served personally.

Solicitor: *The Solicitor to the Board of Trade* for the Board of Trade.

1884.

IN RE H. F.
MARGETTS,
EX PARTE THE
BOARD OF
TRADE.

IN RE F. H. JOHNSTONE, EX PARTE ANGIER.

*Bankruptcy Act, 1883, Section 105—Bankruptcy Rules, 1883,
Rules 105 and 154—Costs.*

Held: That where, after the presentation of a bankruptcy petition, proceedings are carried on by a debtor, from which the official receiver comes to a clear conclusion that substantial advantage has accrued to the debtor's estate, such ought to be looked upon in the light of salvage, and the costs attendant upon the proceedings in question should be allowed out of the estate.

BEFORE
MR. JUSTICE
CAVE.
1884.
July 7.

THIS was an application on behalf of one *Angier*, a solicitor, for a declaration that he was entitled to be paid his costs, charges and expenses of, occasioned by, and incident to the application for an injunction against *Harry Nathan Abraham* from enforcing his bill of sale over the estate of the debtor *F. H. Johnstone*, and the opposing the application of the said *Harry Nathan Abraham* to discharge the order for the injunction made; and that the taxing master be directed to tax and allow out of the assets of the estate of the said *F. H. Johnstone* such costs, charges and expenses accordingly.

The facts of the proceedings in connection with the injunction in question have already been reported in the case of *In re F. H. Johnstone, Ex parte Abraham*, see *ante*, p. 32, and those proceedings had been carried on by *Angier* as solicitor for the debtor, and not by the official receiver for the reasons there shown, and although they proved to be apparently unsuccessful on the ground laid down in *Ex parte Anderson, In re Anderson*, L. R., 5 Ch. App. 473, that "an injunction restraining a person, not a party to the bankruptcy

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IN RE F. H.
JOHNSTONE,
EX PARTE
ANGIER.

proceedings, from dealing with property of a debtor claimed under a bill of sale, the validity of which is disputed, ought not to be granted without requiring an undertaking to be given for damages by the person obtaining the order:" yet it was admitted that owing to the facts elicited during the cross-examination of *Abraham* at the hearing of the application to discharge the injunction, considerable advantage had accrued to the debtor's estate.

Notwithstanding this, however, the taxing master had disallowed all the costs of *Angier* in the matter, and from this decision he now appealed to the Court.

In support of the application, an affidavit of one *Lewis*, managing clerk to *Angier*, was read to the following effect: (1) That on February 9th last he presented a bankruptcy petition for *F. H. Johnstone*, and obtained an injunction against *H. N. Abraham*; (2) that it was necessary this should be done without delay, as *Abraham* threatened to enforce the bill of sale; (3) that on February 20th notice was given by *Abraham* that an application would be made to the Court to discharge the injunction; (4) that on February 23rd the deponent had an interview with the official solicitor as to whether he would arrange to carry the case on; (5) that several other interviews on different days took place with the official solicitor, who desired him to inquire into and inspect the bill of sale, but finally the official receiver declined to defend the motion to dissolve on the ground that there were no assets, but it was agreed that Mr. *Angier* should instruct counsel for the purpose; (6) that on March 3rd the injunction was dissolved simply because no undertaking had been given; (7) that on June 18th all the costs of *Angier* were disallowed by the taxing master.

E. Cooper Willis, Q.C., for Mr. *Angier*:

The official receiver took no steps, simply because there were no assets. The debtor did so through his solicitor, and was instrumental in saving 57*l.* 10*s.* for the estate, for the case lasted the whole day, and Mr. *Abraham* was very strictly cross-examined by me; and, in consequence of the facts elicited, the official receiver took the case up, and served notice of motion to set aside the bill of sale. *Abraham* was so frightened by what had occurred, that he at once gave up the sum of 57*l.* 10*s.* That property was

saved by the steps taken, and I now ask that the costs incurred by Mr. *Angier* may be directed to be paid. (Counsel referred to section 105 of the Bankruptcy Act, 1883, and to Rules 105 and 154 of the Bankruptcy Rules, 1883; and also to the case of *In re Strand, Ex parte The Board of Trade*, see *ante*, p. 196.) If the official receiver had taken the case in hand, the costs would undoubtedly have come out of the estate. It would be only right, that if a debtor does put himself to costs to save the estate, his solicitor should be allowed his proper costs. I do not say what costs. I leave that to the discretion of the taxing master. I ask for the costs incurred in recovering the estate.

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JOHNSTON
EX PART
ANGIER.

CAVE, J.:

The cross-examination in the other action does seem to have caused *Abraham* to give up. Otherwise I doubt if he would have done so without a struggle.

E. Cooper Willis, Q.C.: I ask for some expression of opinion from your Lordship in cases of this kind.

CAVE, J.:

It is difficult to give an opinion. All depends so much on the Judgment. circumstances of each particular case. All I can say is, that when the official receiver comes to a clear conclusion that he has obtained substantial advantage from the course taken by the debtor, that ought to be looked upon in the light of salvage, and costs should be allowed. I will accede to the present application, so far as to allow the costs incurred in connection with the motion for dissolving the injunction in priority according to Rule 105.

E. Cooper Willis, Q.C.: The estate is so small, that I will not press for the costs of this application.

Solicitor: *Angier*.

CASE referred to:—

In re Strand, Ex parte The Board of Trade, see *ante*, p. 196.

BEFORE
MR. JUSTICE
CAYE.
IN CHAMBERS.
1884.
July 12.

IN RE GEORGE GAMES, EX PARTE THE BOARD OF TRADE.

Bankruptcy Act, 1883, Section 21—Notification to the Court by the Board of Trade of Objection to Appointment of a Trustee—Grounds of Objection—Procedure.

Held: That the fact that a trustee has been proposed by the brother of the bankrupt; and that such trustee has previously voted in favour of a composition and scheme of arrangement of the debtor's affairs; and that no committee of inspection is appointed, will not justify the Board of Trade in objecting to the appointment of such trustee under section 21, sub-section (2), of the Bankruptcy Act, 1883, even though the majority in number of the creditors are desirous that such objection should be made.

THIS was the first case brought before the Court of a notification to the Court by the Board of Trade of their objection to the appointment of a trustee, under section 21 of the Bankruptcy Act, 1883.

Section 21 provides—(1) “Where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt; or they may resolve to leave his appointment to the committee of inspection hereinafter mentioned.”

(2) “The person so appointed shall give security in manner prescribed to the satisfaction of the Board of Trade, and the Board, if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment, on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally.”

(3) “Provided that where the Board make any such objection they shall, if so requested by a majority in value of the creditors,

notify the objection to the High Court, and thereupon the High Court may decide on its validity."

In the present case the Board of Trade had objected to the appointment of one *Evan Jones* as trustee in the bankruptcy of *George Games*, upon the grounds stated in the notification following, from which the facts of the case may be gathered :—

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GAMES,
EX PARTE THE
BOARD OF
TRADE.

Notification of Objection by the Board of Trade to the Appointment of Mr. Evan Jones as Trustee in the above matter.

1. The Board of Trade having been duly requested by the statutory majority of creditors in the above matter (as appears by the copy requisition attached hereto) to notify to this Honorable Court their objection to the appointment of Mr. Evan Jones as trustee, hereby notify to the Court that they object to his appointment on the ground that "his connection with and relation to the bankrupt's estate and William Games, a creditor in the above matter and a brother of the debtor, make it difficult for him to act with impartiality in the interests of the creditors generally."

2. On the 23rd January, 1884, a receiving order was made against the bankrupt George Games, of Hay, in the county of Brecon, solicitor, on the petition of Mr. Thomas Stokoe, of Hay, chemist and grocer.

3. The said Evan Jones (whose appointment is objected to) is a member of the firm of Larkin & Jones, drapers, of Brecon, who have tendered a proof as creditors of the said bankrupt for the sum of 90*l.* 1*s.* 4*d.* The said William Games is a solicitor, resident at Brecon, and is brother to the bankrupt. He has tendered proofs as a creditor for the sum of 481*l.* 4*s.* 3*d.* His proof was objected to at the first meeting by the solicitor to the petitioning creditor.

4. The said bankrupt's statement of affairs estimates his assets at 22*l.* and his liabilities unsecured at 1,184*l.* 8*s.* 4*d.*, and alleges, as the cause of his failure, that his practice is too small to cover his expenditure, and to general depression in the agricultural district of Hay.

5. At the first meeting of creditors held at Brecon on the 6th February, 1884, the said William Games proposed that a composition of five shillings in the pound should be accepted. This pro-

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 IN RE GEORGE
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 EX PARTE THE
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 TRADE.

posals was objected to by creditors' present, and the meeting was adjourned to Hay. The adjourned meeting was held at Hay on the 13th February, 1884, and at the adjourned meeting a proposal was made that a scheme of arrangement should be accepted under which the official receiver should act as trustee without a committee of inspection. The said proposal was objected to by the majority of the creditors resident at Hay, but was supported by the said William Games and by other creditors resident at Brecon. The said proposal was not carried at that meeting, but a resolution to adjourn the meeting to Merthyr Tydfil was carried, and, at the further adjourned first meeting, held at Merthyr Tydfil on the 22nd February, 1884, it was resolved to accept the said proposed scheme. The creditors resident at Hay did not vote at the said meeting at Merthyr Tydfil, and the solicitors to the petitioning creditor, on behalf of the creditors resident at Hay, complained to the Board of Trade of the said adjournment, and the Board of Trade instructed the official receiver that when at the Hay meeting the proposed scheme was not carried, it was his duty to have applied to the Court that the debtor should be adjudged bankrupt.

6. At a meeting of creditors held at Brecon on the 5th of March, 1884, the said proposed scheme was negatived, and it was resolved that the debtor should be adjudged bankrupt, and that Mr. Evan Jones, of the firm of Larkin & Jones, drapers, Brecon, should be appointed trustee.

No committee of inspection has been appointed.

7. The said Evan Jones was proposed at the said meeting as trustee by Mr. William Games, of Brecon, solicitor, who is, as already stated, a brother of the bankrupt, who has tendered proofs for the sum of 481*l.* 4*s.* 3*d.* The proposal was seconded by Mr. Lewis Jones, of Brecon, a creditor, who has tendered a proof for 31*l.* 19*s.* 4*d.*

8. On the 8th March, 1884, the Board of Trade received the following letter from Mr. R. F. Griffiths, the solicitor to the petitioning creditor:—

"HAY,
 " March 7th, 1884.

"SIR,

Re G. Games.

"I beg to thank you for your telegram of the 3rd, and letter of the 4th, instant.

"I desire to say that the decision of the Board of Trade, as set out in that letter, has given considerable satisfaction to the general body of the creditors.

"You will, doubtless, have heard from the official receiver that the scheme was rejected at the meeting, and that resolutions of bankruptcy, and appointing a trustee, were passed, although it would seem doubtful whether, under the peculiar circumstances of the case, the meeting was competent to deal with these latter matters.

"The person appointed trustee, Mr. Jones, was the nominee of the debtor's brother, Mr. William Games (whose proofs could control the ordinary resolutions), and, this being so, my clients thought it only fitting that a committee of inspection should be appointed; but the debtor's brother and party—including, I think, the trustee himself—voting against this, the proposition was lost.

"Having regard to this, I would ask that the Board of Trade should jealously exercise their powers, *quâ* a committee of inspection, and otherwise and without any delegation of their authority.

"While asking this, however, I should wish you to understand, that I do not intend in any way to reflect upon Mr. Jones personally, as I know him to be a respectable tradesman.

"In conclusion, I may say, that if at any time I can be of any use in furnishing any information for the assistance of the Board of Trade upon any questions that may arise with reference to the estate, I should be glad in my client's interest to furnish it.

"I am, &c.,

"The Inspector-General in Bankruptcy.

ROBERT T. GRIFFITHS."

9. To this letter the Board of Trade replied as follows:—

"BOARD OF TRADE,

11th March, 1884.

"SIR,

Re G. Games.

"I have to acknowledge the receipt of your letter of the 7th instant.

"The Board of Trade have no desire to interfere with the appointment of trustee, provided it is one in which the interests of all the creditors are likely to be protected; but if, on the other hand, there is any decided feeling among the general body of creditors (as to number) that the selection of the trustee in question (being the nominee of the debtor's brother) is not likely to effect that result, I shall be prepared to submit to the Board of Trade any representations which may be made by them to that effect, with a view of considering whether the appointment ought to be confirmed under section 21 (2); for that purpose, however, I must request to be informed within forty-eight hours.

"B. T. Griffiths, Esq.,

I am, &c.

"Solicitor, Hay."

10. On the 15th of March, 1884, the Board of Trade received the following reply from Mr. Griffiths:—

"HAY,

"13th March, 1884.

"SIR,

Re G. Games.

"I beg to acknowledge the receipt of your letter of the 11th inst., to which, as my telegram of this morning will explain, I was unable to reply by return of post.

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GAMES,
EX PARTE THE
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"I beg to say that there is a very decided feeling among the general body of creditors (as to number) that the selection of the trustee in question is not one under which the interests of the creditors generally are likely to be protected, and I am authorized to express this on behalf of the following, who are a majority in number of those creditors who have proved. [*Here follow the names of such creditors.*]

"They consider that under the circumstance it will be impossible for Mr. Jones to detach himself from the interests of the debtor's brother, Mr. Wm. Games (who is a solicitor practising in Brecon). It is important that he should be able to do this not only on the obvious ground of that gentleman's relationship to the debtor, but also because his (Mr. Wm. Games) heavy claim as fully secured, partly secured and unsecured creditor, all in their opinion require full investigation on the part of the trustee, and also because of his being interested in certain of the property in which the debtor has shares. They think that the fact of Mr. Jones being the nominee of the debtor's brother, coupled with that of his having at the first meeting at Brecon expressed himself in favour of the composition then offered, and of his having all through the subsequent proceedings supported the scheme promoted on the debtor's behalf, voting for it by proxy at the meeting at Hay, and in person at the second meeting at Brecon, and in addition to this, having after his appointment as trustee voted against the motion for a committee of inspection (the rejection of which had been proposed by Mr. Wm. Games), cannot but identify him with the interests of the debtor and his brother, and prevent his taking an independent course in the matter for the benefit of the creditors generally.

"They trust, therefore, that the Board of Trade will not see fit to confirm the appointment.

"I am, &c.,

"The Inspector-General in Bankruptcy.

ROBERT T. GRIFFITHS."

11. Having considered the foregoing correspondence, the Board of Trade informed the official receiver that they declined to confirm the appointment of the said Evan Jones, and on the 29th March, 1884, the official receiver wrote to the said Evan Jones to that effect.

12. On the 24th April, 1884, the Board of Trade received the following letter from Messrs. James & Co., the solicitors to the debtor:—

"MERTHYR TYDFIL,

"23 April, 1884.

"DEAR SIR,

Re George Games, Brecon, Bankrupt.

"The official receiver of the Merthyr Tydfil district having on the 28th ult. informed Mr. E. Jones, the duly-elected trustee in this matter, that the Board of Trade objected to his appointment, the majority of creditors have determined to test the validity of the objection, as Mr. Jones is one of the most responsible men in the town of Brecon, and the objection is a

reflection upon his stability as a man of business and his integrity as an upright and straightforward man.

"In pursuance of section 21, sub-section (3), and Rule 220 (1), we beg to enclose you a requisition, signed by a majority in value of the creditors of the said G. Games, requesting that the Board of Trade will forthwith notify their objection to the appointment of Mr. E. Jones as trustee to the High Court.

"Inasmuch as Mr. Jones has not been informed on what ground the Board of Trade object to his appointment, may we ask you to furnish us with a copy of any communication the Board of Trade may make to the High Court, stating the grounds of its objection, so that Mr. Jones may know what he has to deal with at the hearing.

"We are, &c.,

"JAMES & Co."

REQUISITION.

"*Re George Games.*

"We, the undersigned, being the majority in value of the creditors of the above-named George Games, do hereby request the Board of Trade to notify to the High Court their objection to the appointment of Mr. E. Jones, of Brecon, in the county of Brecknock, draper, as trustee of the property of the said bankrupt, the said Evan Jones having been elected to the said position of trustee unanimously at a meeting of the creditors of the said George Games, duly convened and held at Brecon, on Wednesday, the 5th day of March, 1884, and which said meeting was presided over by William Lewis Daniel, Esq., official receiver, who, in accordance with the vote of the creditors, declared that the said Evan Jones had been appointed by unanimous vote of creditors present or represented at the meeting. Dated this 2nd day of April, 1884."

[Signatures of creditors to the amount of £814 : 16s. 8d.]

To this letter the Board of Trade replied that they felt unable at present to comply with the requisition, and the Board proposed that the official receiver at Bristol should make a special inquiry into the circumstances of the case, and recommend to the creditors for appointment to the trusteeship some person who would give confidence to all parties.

This attempt at a settlement, however, proved altogether unsuccessful, and considerable further correspondence took place, in the course of which the following memorial from the creditors who objected to the appointment of Mr. Jones, and stating the reasons of their objection, was forwarded to the Board of Trade.

"We, the undersigned creditors of the above-named debtor, record our objections to the appointment of Mr. Evan Jones, of Brecon, as trustee in this matter on the following grounds:—

"1. He was nominated by the debtor's brother, Mr. William Games, solicitor, of Brecon, with whom the debtor is now residing, and whose

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dealings with the debtor ought to become the subject of strict inquiry by any trustee who is appointed, his proofs of debt on which he voted having been objected to at a meeting of creditors, and in which proofs he has omitted to give credit for moneys which the debtor, on his public examination, swore he had received. Mr. William Games and the debtor are, moreover, jointly interested in certain freehold properties.

"2. Mr. Evan Jones himself, at each of the meetings held previously to his being proposed as trustee, and at that meeting, had supported the debtor's offer of a composition, and the scheme which, on the composition being withdrawn in deference to the obvious feeling of creditors against it, was proposed in substitution for it, and rejected at the meeting at Hay.

"3. That he opposed and voted against having any committee of inspection after he had been appointed as such trustee.

"4. That from first to last he has so identified himself with the interests of the debtor and his brother, whose claims would as aforesaid have to be investigated, that we strongly oppose his appointment as trustee, and respectfully urge the Board of Trade to refuse their sanction to the same, and to insist on the appointment of some wholly independent trustee.

"5. The above objections are distinct from and in addition to that based on the informality of all the proceedings at the Brecon meeting of March 5th, at which it is alleged Mr. Evan Jones was appointed trustee, we being advised and believing that the Merthyr meeting which was called as a confirming meeting was itself informal, and that, therefore, nothing done at the said confirming meeting could be valid.

"6. Although the chairman of the said meeting, March 5th, signed the resolution appointing Mr. Evan Jones as having been carried unanimously, that must be taken only as meaning that the majority in number, being a minority in value, reckoning the debtor's brother's proof, did not think it worth while to divide the meeting, and were, besides, under the impression that a committee of inspection would have been chosen, which, however, the debtor's brother and the trustee objected to, and were in a position to refuse, and did, in fact, refuse, when proposed.

"We would add, that the objections we have herein stated to the appointment of Mr. Jones, were the grounds of our previous objection thereto made to the Board of Trade through Mr. R. T. Griffiths, solicitor.

"Dated this 10th day of May, 1884."

[Signatures of twenty-two creditors.]

The matter was now brought before the Court for decision.

M. D. Chalmers for the Board of Trade.

Upjohn for the trustee.

M. D. Chalmers: This is the first case in which the Board of Trade has been required to notify to the Court under section 21,

sub-section (3). The first question is one of procedure. What is the proper course to take? Who is to begin?

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[CAVE, J. : I think it is more convenient that you should begin. You have made an objection, and the affirmative seems to lie upon you. I have to decide whether your objection is good or bad. I ought to hear what the objection is, and the grounds of it, and that comes from you. The more convenient course is, that the person who has an objection should state it.]

M. D. Chalmers (after stating the facts as set out above, and also reading the notification of the Board of Trade, and the whole of the shorthand writers' notes of the public examination of the debtor) said :—

There is no personal objection to Mr. *Jones*; but the Board of Trade are of opinion that it is contrary to the spirit of the Act that opposing parties of creditors should fight for particular persons as trustees. It appears to the Board, from the facts laid before them, that the creditors resident at Hay, and those resident at Brecon, have formed themselves into opposing parties. The creditors at Hay, as a body, have determined that the affairs and conduct of the bankrupt should be strictly investigated according to the law of bankruptcy: while the Brecon creditors have desired that the more lenient course of a scheme or composition should be accepted. In the opinion of the Board of Trade it would be impossible for a trustee, taken from either of the opposing bodies, to enjoy the confidence of the general body of creditors; and it would be very difficult for him to act with impartiality in the interests of all. One ground of objection to the appointment of Mr. *Jones* is that he is the nominee of the debtor's brother.

[CAVE, J. : You surely cannot say that the nominee of the brother of a debtor is always unfitted to be trustee.]

Then he supported the proposal for the composition and also for the scheme of arrangement.

[CAVE, J. : That is not in connection with the bankruptcy properly so called. Moreover, I cannot see that what he did was not *bonâ fide*.]

1884. The petitioning creditor, Mr. *Stokoe*, is very anxious to have
 IN RE GEORGE some other person as trustee.
 GAMES,
 EX PARTE THE [CAVE, J.: Yes, and I notice that *Stokoe's* signature appears as
 BOARD OF witnessing the signatures of a large number of the creditors who
 TRADE. signed the memorial to the Board of Trade against Mr. *Jones's* ap-
 pointment. He evidently went about with that requisition.]

W. Games, the debtor's brother who nominated Mr. *Jones*, has the largest proof.

[CAVE, J.: If that argument is worth anything it comes to this, that the largest creditor never can name a trustee. You must show that the trustee would be under the hand of the debtor's brother. If you had shown that he was his clerk or agent it might be a good reason to object to the appointment, but as it is you must show some evidence of partiality. The mere fact that the creditors are divided into two hostile camps does not give to the Board of Trade the right of appointing a trustee.]

The creditors who supported the appointment of Mr. *Jones* being the majority, had the power of saying whether there should be a committee of inspection, but they did not accede even to this. *Evan Jones* himself voted against the proposal.

[CAVE, J.: The effect of that was to make the Board of Trade the committee of inspection. That is rather evidence of bona fides.]

Upjohn :

So far as I can see there has been no evidence brought forward in support of the assertion that the trustee's connection with the bankrupt's estate, and with the bankrupt's brother, renders it impossible for him to do his duty properly. In his affidavit *Evan Jones* denies implicitly that such is the case, and says that there is no understanding whatever between himself and any other person as to the mode in which he is to perform the duties of his office. The whole proceeding is a mistake. The provision in the Act being that the trustee shall be elected "by the majority in value of the creditors," the Board of Trade have thought fit to add to the Act the further provision "that the trustee shall be a person who

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LONDON:

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1884

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4, ESSEX COURT,
TEMPLE, E.C.

December 18th, 1884.

is viewed with favour by the majority in number of the creditors." The objection that because *Evan Jones* voted in favour of the composition and scheme of arrangement which was rejected he is therefore unfitted to be trustee in the bankruptcy, is absurd. The sole grounds on which the Board of Trade can object to a trustee are clearly specified in the Act. Here the minority in value, but the majority in number, simply say they have no confidence in the trustee. It is a confidence trick. If it was successful it would simply give to the minority in value a power of *veto* which was never intended by the Act.

1884.
IN RE GEORGE
GAMES,
EX PARTE THE
BOARD OF
TRADE.

CAVE, J. :

I have no doubt whatever that in this case the Board of Trade Judgment. have been actuated by a sincere desire for the welfare of the general body of the creditors, and it is my duty to see that desire carried out as provided by the Bankruptcy Act, 1883. By section 21, sub-section (2), the Board of Trade are bound to certify the appointment of a trustee unless they object upon fixed grounds, and except upon those grounds they have no authority to interfere. The grounds, as provided by the Act, are "that the appointment has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally," by which I understand where there would be a contest between duty and his interest, or favour and affection towards any particular creditor. In this case I have no doubt a strong feeling has developed amongst the creditors, probably of recent date, and which did not exist when the trustee was appointed. The bankrupt had a receiving order made against him on the petition of *Stokoe*, and that there was a strong feeling between the bankrupt and *Stokoe* is beyond a doubt. That being so, the statement of affairs which is filed shows practically no assets; it shows scarcely a farthing in the pound to divide amongst the creditors. The assets are set down as 22 $\frac{1}{2}$., and from the facts elicited at the public examination of the debtor that estimate seems to be a fair one. Then a proposal is made that a composition of 5s. in the pound

1884.
 IN RE GEORGE
 GAMES,
 EX PARTE THE
 BOARD OF
 TRADE.

should be paid at the instance of the debtor's brother, and that proposal was supported by *Evan Jones*. I cannot see that that is a good ground of objection. He might think 5s. a better thing than an adjudication in bankruptcy, which might result in nothing. Then a scheme of arrangement is proposed by which the official receiver was to wind up the estate, but that is negatived at a meeting at which more than half the creditors vote against it, and in consequence adjudication follows; and thereupon the whole body of creditors, both those who were for and those who were against the scheme appoint *Evan Jones* trustee. Now we come to the letter of the solicitor for the petitioning creditor of March 7th (*his Lordship read the letter, which see ante, p. 218*). It is true that *Evan Jones* was the "nominee" of the debtor's brother in the sense that he was "proposed" by him, but it is not shown that he was in any way connected with *W. Games*. It is admitted that *Evan Jones* is a respectable tradesman, and I can see nothing in that letter to justify me to think that he would not act impartially. Then there comes the letter of March 11th (*his Lordship read the letter, which see ante, p. 219*). To my mind that is a most unfortunate letter. It takes a wrong ground. There is no authority for the Board of Trade to interfere if there is any decided feeling amongst the creditors as to number. The right of the Board of Trade to interfere is strictly limited by the Act, and a decided feeling amongst the creditors in number is not one of the grounds of interference given. It is unfortunate also that that letter was written to the solicitor of the petitioning creditor. Now, in the first place, I cannot think that because a large creditor proposes a particular trustee, that on that ground alone there should any suspicion attach to his appointment. But there is something more here, it is admitted that *Evan Jones* is a respectable tradesman and that those who object do not intend to reflect upon his character personally. Moreover, I think that the word "nominee," as used in the letter of March 7th, is calculated to give a wrong impression. *Evan Jones* was the nominee of the debtor's brother in that he was "proposed" by him, but that is all. But I must admit that what puzzles me more than anything else in this case is the objection which has been put forward that the trustee voted against having a committee of inspection. To my mind that, above all else, shows

good faith. Instead of having a committee of inspection of their own under whom the trustee could shelter himself, this shelter is repudiated by *William Games* and the trustee, and the trustee puts himself close to the Board of Trade. I think if the Board of Trade had known the position of the petitioning creditor to the debtor, and had not been induced to suppose that *Evan Jones* was the nominee of the debtor's brother, the Board of Trade would have come to a different conclusion in this case. I do not doubt but that the Board of Trade wished to do its duty, but that can only be done within the limits of the Act. It is not said there shall be no opposition to the appointment of a trustee. It is, in fact, intended there shall be opposition, but there must be a dereliction of duty—the person appointed must be unfit—before the Board of Trade can interfere. In the present case I have come to the clear conclusion that the objection is invalid.

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IN RE GEORGE
GAMES,
EX PARTE THE
BOARD OF
TRADE.

Uppjohn :

Now as to costs. I presume your Lordship will lay down some rule. The Board of Trade ought to pay costs. They have put the trustee and the creditors who support him to infinite trouble, and are in the position of ordinary litigants.

CAVE, J. :

I am of opinion that I ought not to order the Board of Trade to pay the costs of the trustee. This is a new Act, and it has imposed new duties on the Board of Trade. Those duties are, in certain cases, of considerable difficulty, and as long as they are performed honestly, I do not think a mistake ought to be visited too heavily, unless such mistake might clearly be avoided. But I must again express my opinion that it would have been far better if that letter of March 11th had not been written. Before, all that was asked was that the Board of Trade would jealously exercise their power. It is certainly to be regretted that the official who wrote that letter suggested that matters should be laid before the Board. Where there are opposing bodies of creditors it is almost certain, when the expectation is held out that if certain evidence can be brought forward a trustee may be refused, that that evidence will be forthcoming. But I do not think this is sufficient to make the Board

1884. of Trade pay costs. The trustee will have his costs out of the
 IN RE GEORGE estate; as to the Board of Trade there will be no order as to costs.
 GAMES,
 EX PARTE THE BOARD OF
 TRADE.

Solicitors: *The Solicitor for the Board of Trade*, for the Board of
 Trade.

Schultz & Son, for the trustee.

BEFORE
 MR. JUSTICE
 WILLS.
 1884.
 July 25.

IN RE RODWAY, EX PARTE PHILLIPS.

*Bankruptcy Rules, 1883, Rule 104 and Rule 102—Bankruptcy Act, 1883,
 Section 73, Sub-section (3); and Section 168.*

Solicitor's Bill of Costs—Review of Taxation.

Held: That an application by the Board of Trade for a review of
 taxation of the costs of a solicitor under Rule 104 of the Bankruptcy
 Rules, 1883, can only be made for the benefit of the estate, and where
 there is no estate and no trustee such rule will not apply.

THIS was an application made to Mr. Justice WILLS (sitting as
 the judge in bankruptcy for Mr. Justice CAVE), on behalf of
S. H. Phillips, the solicitor of the debtor, *R. Rodway*, for an order
 staying all proceedings in a proposed review of taxation of the
 costs of the said solicitor, and for a further declaration that the
 Board of Trade were not entitled to have such review of taxation.

On January 25th last a petition was filed by the debtor *R. Rodway*
 in the County Court at East Stonehouse, and a receiving order was
 made against him on the same day.

At the first meeting of creditors resolutions were passed that a
 composition should be accepted, and these resolutions were subse-
 quently confirmed at a second meeting as required by the Bank-
 ruptcy Act, and on April 18th were approved by the Court.

On the same day an order was made rescinding the receiving
 order.

Throughout these proceedings *S. H. Phillips* acted as solicitor
 for the debtor, and on June 19th his bill of costs was taxed by the
 Registrar of the County Court at 63*l.* 18*s.* But on July 12th a
 letter was received by *Phillips* from the official receiver stating
 that the Board of Trade required the taxation of the costs to be

reviewed by the taxing master in bankruptcy, under Rule 104 of the Bankruptcy Rules, 1883, and that an appointment had been made for the purpose of such review.

The solicitor now applied to the Court for an order to stay these proceedings.

E. Cooper Willis, Q.C. (F. C. Willis with him), for the solicitor, after stating the facts, said:—

I wish now to draw attention to the Rules. Rule 104 (1) provides that "The Board of Trade may require the taxation of the bills of costs, charges, fees or disbursements of any solicitor, accountant, auctioneer, manager, or other person, where the taxation has been made by a registrar of a County Court, to be reviewed by a bankruptcy taxing master of the High Court, and may appear on the review of such taxation; and where any such review is directed, the registrar of the County Court shall forward to such master of the High Court the bill which is required to be reviewed, and such master shall review such taxation. If upon the review the bill is allowed at a lower sum than that allowed by the registrar of the County Court, the amount disallowed shall be repaid to the trustee. (2) The solicitor, accountant, auctioneer, manager, or other person, whose bill is directed to be reviewed, shall have notice of the time appointed for such review, and the costs of his appearance thereat shall be allowed to him out of the estate, unless the Court otherwise orders." I submit, first, that this Rule 104, which gives authority for the Board of Trade to interfere, and makes the bankruptcy taxing master a sort of appeal court, is contrary to the spirit of the Act and *ultra vires*. The position of the Board of Trade has been misunderstood. It has nothing to do with the costs of solicitors. The Board of Trade appoints the official receiver; it investigates the conduct of the trustee, and does other things of like nature; it sounds, so to speak, upon the official receiver and the trustee, but no more. The section of the Act which relates to costs is section 73, and by subsection (3) of that section "All bills and charges of solicitors, managers, accountants, auctioneers, brokers and other persons, not being trustees, shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the trustees'

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IN RE
RODWAY,
EX PARTE
PHILLIPS.

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IN RE
RODWAY,
EX PARTE
PHILLIPS.

accounts without proof of such taxation having been made. The taxing master shall satisfy himself, before passing such bills and charges, that the employment of such solicitors and other persons, in respect of the particular matters out of which such charges arise, has been duly sanctioned." In that section it is provided that such costs shall be taxed by the "prescribed officer," and by section 168—the interpretation clause of the Act—"prescribed" is defined to mean "prescribed by general rules within the meaning of this Act," while further, by Rule 102, it is expressly provided that "In a County Court costs shall be taxed by the registrar in person." The Act distinctly says the prescribed officer, and Rule 102 is to the effect that that officer is the registrar. The framers of Rule 104 had no power to grant or allow an appeal otherwise than as directed by the Act. They could not make the London taxing master the appellant officer for the County Court. There is no right for the Board of Trade to interfere; but even if the Board of Trade or the official receiver could interfere to ask a review before some person, the Act says the prescribed officer, and that is the registrar of the Court, and I submit that the rule in question is *ultra vires*. But in the second place, even assuming the rule is not *ultra vires*, if the Board of Trade interfere they must interfere in a special way. The Board can only proceed to review the taxation on obtaining an order from the Court for that purpose. The wording of Rule 104 is "The Board of Trade *may require*," and further, "where any such review *is directed*." There is the power of requiring, but the Board must do something to show they have a right to review the taxation. The Board of Trade are not a judicial body, and some order of the Court must be obtained. The Board must show some case on which the application should be granted, and it ought not to be left to its own will and pleasure. Rule 19 says, "Every application to the Court . . . shall be made by motion." A motion ought to be made by the Board of Trade, and some *prima facie* grounds shown before a review is allowed. Further, I contend, in the third place, that under no circumstances could the Board of Trade make an application such as this except for the benefit of the estate. Therefore, where there is no estate, and no trustee to receive any money if the bill is taxed down, the rule:

cannot apply. The idea of the whole thing is that the estate is vested in the official receiver or the trustee. Where the receiving order is rescinded, and where there is no official receiver or trustee, the Board has no power to make the application. Rule 104 (2) provides that the costs of the person whose bill is reviewed may be allowed him "out of the estate." How can they be got where there is no estate? The right to make the application is gone. This is the first case that has been brought forward on this point. I wish to say that my client is in no way acting in a hostile spirit, but it is felt that some mistake has arisen, and it is advisable that the law upon the point should be laid down.

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IN RE
RODWAY,
EX PARTE
PHILLIPS.

M. D. Chalmers for the Board of Trade :

Several points have been raised in this case, some of which were not indicated by the affidavits. I confess at once on one point I feel I am in great difficulty. In this case the receiving order has been rescinded, and rescinded for the purpose of confirming a composition or scheme. Under the composition or scheme there is no trustee. It raises an important question as to the status of a debtor whose property is re-vested in him.

[At the suggestion of the learned judge it was arranged that the case should stand adjourned by consent for six days in order that time might be given to the Board of Trade for further consideration of the matter.]

July 31st.

M. D. Chalmers : Your Lordship will remember that this case was adjourned for consideration. Three points were raised by *Mr. Willis*, and as to the first two I am perfectly prepared to argue them, but I must say at once that with regard to the third objection, that when there is no trustee Rule 104 does not apply, after due consideration I have come to the conclusion that it is so.

WILLS, J. :

In that case, then, without offering any opinion as to the value Judgment. of the first two points, I may say that I will allow the application to stay the proceedings in relation to the proposed review of taxation, with costs.

1884.

IN RE
 RODWAY,
 EX PARTE
 PHILLIPS.

M. D. Chalmers: I would ask your Lordship not to give costs. The Board of Trade were acting in a public capacity.

E. Cooper Willis, Q.C.: I submit (1) that as a rule costs follow the event; (2) this rule is only broken through when the person appealing has misled the other side. Here the Board of Trade had all the papers, and they could exercise their own discretion. The Board knew perfectly well the bankruptcy did not exist, and they carried on the matter with their eyes open.

WILLS, J.:

I think this is a case in which costs should be allowed. I am quite desirous of upholding the legitimate influence of the Board of Trade, but I cannot see any reason here why they should be considered differently from an ordinary litigant.

Application allowed with costs.

Solicitors: *Purkis & Co.* for S. H. Phillips.

The Solicitor to the Board of Trade for the Board of Trade.

DIVISIONAL
 COURT.

BEFORE
 HAWKINS, J.,
 WILLS, J.

1884.

July 29
 and
 August 12.

IN RE J. A. MAY, EX PARTE E. MAY.

*Bankruptcy Act, 1883, Section 125, Sub-sections (1), (2), (3), (4) and (5).
 Administration in Bankruptcy of Insolvent Estate—Transfer of Administration
 Proceedings from the High Court to a County Court.*

Held: (1) That where an order has been made under sub-section (4) of section 125 of the Bankruptcy Act, 1883, transferring proceedings for the administration of a deceased debtor's estate from the Chancery Division of the High Court to the Court exercising jurisdiction in bankruptcy, the latter Court may make an administration order on an *ex parte* application by a creditor.

(2) But such order cannot be made until the expiration of two months from the date of the grant of probate or of letters of administration, unless either the legal personal representative of the deceased debtor consents thereto, or unless such debtor has committed an act of bankruptcy within three months prior to his decease.

THIS was an appeal from an order of the County Court at Macclesfield directing "that the estate of the said *John Aubyn May*,

deceased, shall be administered according to the law of bankruptcy, pursuant to section 125 of the Act"—which provides for the administration in bankruptcy of the estate of a person dying insolvent—"and that *Arthur Crabtree Procter*, the official receiver of the Court, be the trustee of the property of the said *John Aubyn May*."

1884.
IN RE
J. A. MAY,
EX PARTE
E. MAY.

On March 24th, 1884, the above-mentioned *John Aubyn May* died intestate at Congleton, within the bankruptcy district of the Macclesfield County Court; and on June 12th letters of administration to his estate were granted to his widow, *Elizabeth May*, the appellant in the present case.

On the same day, proceedings for the administration of the estate were commenced in the Chancery Division of the High Court of Justice, but on July 4th, on the application of the Manchester and Liverpool District Banking Company, these proceedings were transferred, by order of Mr. Justice KAY, to the Macclesfield County Court.

In this Court, on July 18th, upon an *ex parte* application by the banking company, an order directing administration in bankruptcy under section 125 was made by the registrar, against which *Elizabeth May*, the administratrix, now appealed.

E. Cooper Willis, Q. C. (A. D. Tyssen with him): The order for administration is bad, and that for two reasons—(1) It was made within two months from the date of the grant of letters of administration. (2) It was made *ex parte*. Sub-section (3) of section 125 provides that "An order of administration under this section shall not be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative of the deceased debtor, or unless the petitioner proves to the satisfaction of the Court that the debtor committed an act of bankruptcy within three months prior to his decease." In the present case the two months mentioned in this sub-section had not expired; no consent was obtained from the administratrix, and no suggestion has been made that the debtor committed an act of bankruptcy. This two months, which are set as a limit, are to be considered when an administration order is made after a transfer of proceedings under

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 IN RE
 J. A. MAY,
 EX PARTE
 E. MAY.

sub-section (4) of section 125 equally as when an order is made on the petition of a creditor under sub-section (2) of the same section. The words of sub-section (3) are particularly "under this section." Then as to the order being made *ex parte*. Rule 201 provides that the petition of a creditor under section 125 shall be served on the personal representative. There is, it is true, no special provision as to the service of an application for an administration order after a transfer of proceedings under sub-section (4), but such being the case, Rules 19 and 20, which require notice of motion to be given to all persons interested, would apply generally. It was clearly intended that the personal representative should be heard before an order of this kind is made.

Winslow, Q. C. (R. V. Williams with him): There are two methods of procedure given by section 125. (1) By sub-sections (1) and (2) on the petition of a creditor. (2) Under sub-section (4) where a transfer of proceedings is ordered, and in that case a petition is not presented. It may happen that during the two months after probate or letters of administration have been granted, proceedings for the administration of the deceased debtor's estate may have been commenced in another Court, and then such Court, on the application of any creditor, and on proof that the estate is insufficient to pay its debts, may transfer the proceedings to the Court exercising jurisdiction in bankruptcy, which may then make an order for administration in the prescribed manner. But it is to be noticed that the Court, before directing such transfer, must have proof that the estate is insufficient to pay its debts, just as a Court of Bankruptcy must be so satisfied before it will make an administration order on petition under sub-section (2). When a transfer is ordered it is not necessary that the question of the insolvency of the estate should be tried a second time. In such a case the order of the County Court is purely ministerial. Then as to the question of the two months' time mentioned in sub-section (3). In that sub-section the word "petitioner" is expressly used, and the sub-section only refers to proceedings by petition. Under sub-section (4) the proceedings are not by petition, and the provisions of sub-section (3) do not apply.

August 12th.

On this day the written judgment of the Court was delivered as follows:—

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IN RE
J. A. MAY,
EX PARTE
E. MAY.

WILLS, J. :

This is an application on behalf of the administratrix of *May* Judgment. that an administration order made under section 125 of the Bankruptcy Act, 1883, in virtue whereof the property of the intestate vests in the official receiver instead of remaining in the administratrix, may be rescinded on the grounds (1) that the registrar had no power to make as he has done such order before the expiration of two months from the date of the grant of letters of administration; (2) that such order was made *ex parte*.

The intestate *May* died on the 24th day of March, 1884. Administration was granted to the applicant on the 12th of June, and on the same day an administration action was commenced by a creditor in the Chancery Division of the High Court; and afterwards, by order of Mr. Justice KAY, the proceedings for administration were transferred to the Macclesfield County Court as the Court exercising jurisdiction in bankruptcy. That Court on the 18th July, 1884, made the order now complained of.

By section 125 (*The judge read section 125, sub-sections (1) to (4) .*) It will be convenient to consider first the second objection; viz. that the order now under appeal was made *ex parte*.

Under section 125 an "order for administration" may be made by the Court (*i. e.*, the Court exercising jurisdiction in bankruptcy) within the jurisdiction of which the debtor resided or carried on business for six months immediately prior to his death (section 168 and section 125, sub-section (10)) under two sets of circumstances. (1) There may be a case in which no proceedings have been instituted for administration of the estate of the debtor, and then a creditor duly qualified may upon mere proof of debt obtain an "order for administration in bankruptcy;" the onus of proving that the estate may be expected to be solvent, and that interference with the ordinary course of administration is therefore unnecessary, being thrown upon the executor or administrator. (*See Rule 201, Form 11.*) One further condition is imposed by sub-section (3), viz., that if the order be made within two months of the death of

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the debtor there must be either consent of the executor or administrator or proof of an act of bankruptcy. After the lapse of that period mere proof of the debt, where the executor or administrator fails to satisfy the Court of the solvency of the estate, is sufficient to support the order. (2) The estate may be already in course of administration by legal process. In such a case, by virtue of sub-section (4) the Court in which the administration action is pending may, on the application of a creditor and on proof of the insolvency of the estate, transfer the proceedings to the proper Court for the exercise of bankruptcy jurisdiction, and when that Court is under these circumstances once seised of the case, it may in the prescribed manner "make an order for the administration of the estate of the deceased debtor," which is to have the like consequences with an administration order made (under sub-section (1)) on a creditor's petition, which is a synonym for saying that the order shall be for administration according to the law of bankruptcy. The form of the order to be made under sub-section (1) is given in the Appendix of Forms, No. 31. It directs that the estate be administered in bankruptcy. The order to be made under sub-section (4) directs that the estate be administered according to the law of bankruptcy pursuant to section 125. We think it impossible to draw any kind of distinction between the two as to their meaning or legal operation, and that each is an order for administration of the estate of the deceased debtor, or an order for administration under this section according to the varying phraseology of different portions of section 125. The order is the same and is made by the same Court in each case. It is only the machinery for obtaining it which differs. The one is obtained upon petition, the other without a petition. Section 125 starts with the provisions applicable to proceedings by way of petition, and empowers the Court, unless satisfied of the solvency of the estate, to grant the administration order upon mere proof of the debt, a view which is supported by Form 11, which is the form of a petition under section 125, and which (omitting a paragraph intended only for use in case the application be made within two months of the debtor's death) indicates proof of nothing except the place of residence of the debtor and the creditor's debt. Now under

sub-section (4), before the transfer from the Court in which the administration suit is pending to the Court exercising bankruptcy jurisdiction can be had, it is necessary for the petitioner to be duly qualified (sub-section (10)), which implies that he must prove that fact, and he must prove that the estate is insolvent. He must therefore prove more and not less than the petitioner under sub-section (1) before he can get the order of transfer. By Form 11 he must summon the executor or administrator before he can obtain the order and before the transfer is made; therefore the executor or administrator must have been heard, or at least must have had the opportunity of being heard, to contest the very points and the only points which would be in controversy upon a creditor's petition, the only difference being one in his favour, viz., that in order to obtain the transfer the creditor must accept the onus of proving that the estate is insolvent, instead of merely leaving the executor or administrator to prove to the Court, if he can, that the estate is solvent. Under these circumstances it seems preposterous to suppose that it can be necessary to have the same matters brought into controversy a second time in the Court to which the transfer has been effected before the administration order can be made. They have been already the subjects of adjudication by a competent Court, and the party concerned in denying them has already been heard upon them. We, therefore, see no reason why the order should not be made *ex parte*.

The other objection, however, that the order was made within two months of the date of the letters of administration appears to be fatal. The same considerations which have led us to the conclusion that there is no distinction between the order of administration under sub-section (1) and that under sub-section (4), makes it impossible to draw a distinction between them as to the application of sub-section (3). Whether the latter portion of that sub-section, providing for proof by the petitioner of an act of bankruptcy, be capable of being satisfied in case of proceedings under sub-section (4), may be open to discussion. There is no doubt, however, that the earlier portion relating to the concurrence of the executor or administrator is equally applicable in both cases, and there is, therefore, no inherent difficulty in giving their plain, natural and unmistakeable meaning to the words of sub-section (3),

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which says in terms that no such order as has been granted in the present case shall be granted until the lapse of two months from the grant of administration. The appeal must therefore succeed, and the order of the County Court of the 18th of July be set aside, and the appellant must have her costs.

*Appeal allowed. Leave given to appeal to the Court of Appeal.*

Solicitors: *H. T. Raw*, agent for *Llewellyn & Ackrill*, Tunstall, for the appellant.

*Robinson, Preston & Son*, agents for *Hollinshead & Moody*, Tunstall, for the respondents.



COURT OF  
 APPEAL.  
 BEFORE  
 BAGGALLAY,  
 L. J.,  
 COTTON, L. J.,  
 LINDLEY, L. J.  
 1884.  
 ~~~~~  
 August 4.

IN RE CHAPMAN, EX PARTE EDWARDS.

Solicitor—Personal Liability—Relation back of Trustee's Title.

Held: That where the solicitor of the petitioning creditor, as his agent, had received from the debtor between the date of the act of bankruptcy and the adjudication, various sums of money in consideration of several adjournments of the hearing of the petition, such solicitor was personally liable to refund such money to the trustee in the bankruptcy, even though it had been paid over or accounted for by such solicitor to the petitioning creditor before the date of the order of adjudication.

THIS case, which was an appeal from a decision of Mr. Registrar *Murray*, although arising under a petition presented under the Bankruptcy Act, 1869, raised an important question generally with regard to the liability of solicitors who act for creditors presenting bankruptcy petitions.

The facts were not in dispute and were as follows:—On February 20th, 1883, one *John Storey* presented a bankruptcy petition against the debtor, *James Chapman*, the debt being 492*l.* 5*s.* 0*d.*; and the act of bankruptcy alleged being the failure of *Chapman* to comply with a debtor's summons which had previously been served on him on behalf of *Storey*.

Thomas Edwards, the appellant in the present case, acted as solicitor for *Storey* in the service of the debtor's summons, and also

in the presentation of the bankruptcy petition; and he was of course fully cognizant of the act of bankruptcy.

On March 5th, 1883, the petition came on for hearing, but was adjourned by consent until April 10th, *Chapman* paying 100*l.* in consideration of this postponement, and on three subsequent occasions similar adjournments took place, *Chapman* paying altogether 305*l.* in four sums for the accommodation. These four sums were received by *Edwards*, and accounted for by him to *Storey*, the account showing that a certain portion had been handed over to *Storey* and the balance retained by *Edwards* in payment of costs.

On October 24th, 1883, the petition was at length heard, and *Chapman* was adjudicated a bankrupt. The trustee in the bankruptcy thereupon claimed the 305*l.* paid over, as forming part of the bankrupt's estate divisible among his creditors, and application was made to the Court for an order that *Edwards* should refund it, on the ground that he received the money with notice of the act of bankruptcy to which the title of the trustee related back.

An order was made by Mr. Registrar *Murray*, directing *Edwards* to pay to the trustee the 305*l.*, against which *Edwards* now appealed.

dB. Terrell (*Wyatt Hart* with him) for the appellant:

Storey is liable to pay the money back, but I presume, because he is not in a position to do so, this attempt is made to show that *Mr. Edwards* is also liable. I submit that there is no case in the books to make a solicitor liable in a case of this kind where there has been no fraud on the part of the solicitor.

[BAGGALLAY, L. J.: Between the act of bankruptcy and the adjudication the property came into the hands of *Edwards*, and he handed it to *Storey* and not to the trustee.]

It came to *Edwards'* hands as agent. He was employed by *Storey*, and was bound to hand over the money which he received to him. If *Edwards* had joined in a fraudulent transaction he would be personally liable, but as there is not fraud he is protected by his authority. All the cases which were relied upon in the Court below tended to show this, that where there is no tort or no

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fraud a duly authorized agent receiving money on behalf of his principal is protected by his authority.

[Counsel referred to *Stevens v. Badcock*, 3 B. & A. 354; *Stead v. Thornton*, 3 B. & A. 357; *Cranch v. White*, 1 Bing. 414; *Attorney-General v. Earl of Chesterfield*, 18 Beav. 596; *Maw v. Pearson*, 28 Beav. 196; *Hollins v. Fowler*, L. R., 7 H. L. Cas. 757; *Helder v. Lewis*, L. R., 24 Ch. Div. 339, and other cases.]

[COTTON, L. J.: The payment was an improper payment, assuming the adjudication afterwards took place. Can it be right for a creditor who has presented a petition to take, while the petition is pending, what, if the petition is carried out, ought to go to pay all the creditors?]

[LINDLEY, L. J.: Look at *Sharland v. Milden*, 5 Hare, 469.]

Winslow, Q.C. (*Sidney Woolf* with him), for the trustee, were not called upon.

BAGGALLAY, L. J. :

Judgment.

It appears to me that as soon as one appreciates the facts of this case, the propriety of the order of the registrar is clear. Numberless cases have been cited; some, in my opinion, altogether unnecessarily. In none is the relative position of the persons as it is in the present case, and I have received no assistance from them. On October 24th *Chapman* was adjudicated bankrupt by *Storey*, and for *Storey*, *Edwards* acted as solicitor. The act of bankruptcy alleged was the non-payment of a debt of about 500*l.* As early as March 25th the matter was in Court, and then *Chapman* handed to *Edwards* for *Storey* 100*l.* On April 9th he handed 150*l.*, and in May 50*l.* and 25*l.*—thus commencing in March and ending in May 305*l.* in all was paid over. These payments were made by the debtor, and were paid to the solicitor for the petitioning creditor. Certain of these sums were handed by *Edwards* to *Storey*, and the balance was accounted for as costs due from *Storey* to *Edwards*. The question raised was whether the several payments made by

Edwards to *Storey* were payments properly made, and it was said that *Edwards* acted simply as agent for *Storey*, and that he was bound to hand over the money which he received to him. I cannot see this. The act of bankruptcy had been committed prior to the receipt of the first of these payments. *Edwards* was cognizant of that fact. The petition was actually pending, and *Edwards* was well aware that if adjudication took place, the title of the trustee would relate back to the act of bankruptcy. Possessing that knowledge he acted as he did, he handed over money which he knew would belong to the trustee. It is only necessary to show the facts of the case to see that such handing over cannot be justified, and the appeal must be dismissed.

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COTTON, L. J. :

I am of the same opinion. A great many cases have been referred to to show that an agent is not liable where there is no fraud. But the argument has not been kept close enough to what I mentioned before, viz. : whether the acts in this case were not improper. In my opinion they were. As long as *Storey* was striving to make *Chapman* a bankrupt he ought not to receive money which, if the adjudication was made, would belong to all the creditors. In my opinion it was a fraud under the bankrupt law, and the order of the registrar was a right order. With regard to what has been urged that *Edwards* had no power to resist a demand by *Storey* for the money I will simply say that, in my opinion, no Court would, under the circumstances, have ordered him to pay it over.

LINDLEY, L. J. :

I, too, think that the order of the registrar is right. *Edwards* was solicitor for the petitioning creditor. He knew where the money came from and where it went. He knew the person who gave it had no business to do so, and that the person to whom he handed it had no business to receive it. Was he justified in doing as he did do? In my opinion, No. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *T. Edwards* for the appellant.

Munns & Longden for the trustee.

BEFORE
MR. JUSTICE
WILLS.

1884.
August 13.

IN RE J. & H. RICHARDS, EX PARTE THE OFFICIAL
RECEIVER.

Bankruptcy Act, 1883, Section 4, Sub-section (1) (a), and Section 43—Assignment of Property for the Benefit of Creditors generally—Allowance of Costs and Expenses to Trustee under the Deed.

Held: That where a deed of assignment of the whole of their property executed by the debtors for the benefit of their creditors generally contained a provision for the payment out of the assets in the first instance of the costs and expenses of the trustee under the said deed of assignment, such trustee was not entitled (on the debtors being adjudged bankrupt upon a petition founded on the deed as an act of bankruptcy) to retain as against the trustee in the bankruptcy assets in his hands, on the ground that a sum exceeding the said assets was due to him for work and labour done.

COMPARE also the case of *In re Riddough, Ex parte Vaughan, post*, p. 258.

THIS was an application on behalf of the official receiver as trustee in the bankruptcy of *J. & H. Richards*, for an order directing one *C. E. Farnfield*, an accountant, who had been appointed trustee under a certain deed of assignment executed by the bankrupts in favour of their creditors, to pay over various sums of money received by him to the official receiver.

The debtors were grocers carrying on business in the Hornsey Road, and on March 12th last they executed a deed of assignment of the whole of their property in favour of their creditors generally, thereby committing an act of bankruptcy. By this deed *Mr. Farnfield* was appointed trustee, and a provision was inserted in it for the payment out of the assets, in the first instance, of his costs and expenses.

On March 31st, however, a receiving order was made against the debtors upon a petition founded on the deed as an act of bankruptcy, and on May 12th they were adjudged bankrupt.

From certain correspondence between the chief official receiver and *Mr. Farnfield* and the accounts furnished by him, it appeared that the whole sum received by him as trustee under the deed of assignment amounted to 25*l.* 17*s.* 0*d.*, but of this 15*l.* 13*s.* 0*d.* had been expended in the purchase of goods and otherwise for the benefit of the business, leaving a balance of 10*l.* 4*s.* 0*d.*, which *Farnfield* claimed to retain as set off against 11*l.* 8*s.* 9*d.* due to him for remuneration.

M. D. Chalmers for the official receiver :

In this case the official receiver is willing to allow the payments which have been made, and only claims the balance of 10*l.* 4*s.* 0*d.* This is not to be taken, however, that the official receiver will, as a general rule, waive his right to claim the whole amount received by a trustee under a deed of assignment of this kind, which is an act of bankruptcy. [See *Bankruptcy Act*, 1883, section 4, sub-section (1) (a).] The title of the official receiver as trustee in the bankruptcy is clear. Section 43 provides that "the bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition ; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor." (Counsel referred to the case of *Smith v. Dresser*, L. R., 1 Eq. 651, and also to *In re Chapman*, *Ex parte Edwards*, see ante, p. 238.)

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IN RE J. & H.
RICHARDS,
EX PARTE
THE OFFICIAL
RECEIVER.

Bartley Dennis (*Torr* with him) for C. E. Farnfield :

By the deed the costs and expenses of the trustee are allowed, and the amount to which Mr. *Farnfield* is really entitled is more than the sum he seeks to retain. From the words used by Vice-Chancellor Bacon in the case of *Woods v. Axton*, reported in the Weekly Notes for 1866 at page 207, I submit that he is clearly entitled to be paid for the work he has done as trustee under the deed. If the present claim is disallowed by the Court, the duties of trustees under deeds of assignment will be attended with considerable difficulty.

M. D. Chalmers in reply :

The charges are simply for work done by *Farnfield* at his own peril as trustee under the deed of assignment. When he undertook

1884. the office he was aware that within three months the debtors might be made bankrupt and he accepted it at his own risk.

IN RE J. & H. RICHARDS,
EX PARTE
THE OFFICIAL RECEIVER.
Judgment.

WILLS, J.:

My difficulty is to see on what principle the official receiver has only claimed the balance of 10*l.* 4*s.* 0*d.* As the case stands it really resolves itself into a claim for work and labour done by *Farnfield* at the request of the bankrupt or whoever appointed him. It is clear from general principles that he can have no claim against the trustee for personal services. Those services were done with full notice of an act of bankruptcy. The application must be allowed with costs, and I do not consider it to be a case where the costs should come out of the estate.

Solicitors: *W. W. Aldridge* for the official receiver.
E. B. Tattershall for C. E. Farnfield.

Cases relied upon or referred to:—

Smith v. Dresser, L. R., 1 Eq. 651; *In re Chapman, Ex parte Edwards*, ante, p. 238; *Woods v. Axton*, W. N. 1866, p. 207.

BEFORE
MR. JUSTICE
WILLS.
1884.
August 13.

IN RE MOSER, EX PARTE THE TRUSTEE.

Bankruptcy Act, 1883, Section 55—Disclaimer—Lease—Removal of Fixtures by Trustee.

Held: That where a trustee seeks to disclaim a lease under section 55 of the Bankruptcy Act, 1883, the Court may, if it thinks fit, under sub-section (3) of section 55 permit such trustee to remove fixtures.

THIS was an application under section 55 of the Bankruptcy Act, 1883, on behalf of the trustee in the bankruptcy, for leave to disclaim the leases of three rooms, formerly held by the bankrupt, and situate in Red Lion Square.

The petition was presented against the bankrupt *Moser* in May last, and the trustee was appointed on July 25th.

Herbert Reed for the trustee :

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There appears only to be one question in the case. The rent of the three rooms is 200*l.*, and this will be paid up to the date of the disclaimer. But there are on the premises certain tenant's fixtures which are valued at about 85*l.* Under the Bankruptcy Act, 1869, in case of disclaimer the fixtures belonged to the landlord. But it is now provided by section 55, sub-section (3), of the new Act that "a trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just." This latter provision was inserted to remedy the evil which formerly existed when a trustee paid the rent and was obliged to leave the fixtures. I submit that it would be a just order in this case either (1) that the landlord should pay a fair sum for the fixtures; or (2) that the landlord should allow the trustee to take them away.

IN RE MOSER,
EX PARTE
THE TRUSTEE.

Mr. Scoles, solicitor, for the landlord :

I would submit that the rent should be paid at any rate up to quarter day.

Herbert Reed :

If a trustee keeps a landlord out of his property for the benefit of the estate, or with the intention of benefiting the estate, then the landlord ought to be paid. But in this case the trustee was not appointed until July 25th. He has come to the Court quite promptly.

WILLS, J. :

That is so. I think it would be just that the landlord should Judgment. either pay for the fixtures or allow the trustee to remove them, but in the latter case I am of opinion that the trustee ought to pay rent until the fixtures are actually removed. (*An order was subsequently drawn up in the following terms: Leave to disclaim. The trustee to pay rent up to the date of the disclaimer. The landlord*

1884. to have two days to say whether he will accept the offer to set off
 IN RE MOSER, the fixtures against the rent. If this offer not accepted, the trustee
 EX PARTE to have four days allowed after to remove the fixtures.)
 THE TRUSTEE.

Solicitors: *Lindsay, Mason, Greenfield & Mason*, for the trustee.
R. C. Hanrott for the landlord.

PRACTICE.

COURT OF
 APPEAL.

BEFORE
 BAGGALLAY,
 L. J., BOWEN,
 L. J., FREY,
 L. J.

1884.

October 31.

IN RE J. J. WALLACE, EX PARTE WALLACE.

*Bankruptcy Rules, 1883, Rule 125—Petition by Creditor—Signature of Petition
 by Attorney.*

Held: That a bankruptcy petition presented by a creditor may be
 signed on behalf of such creditor by his duly constituted attorney.

THIS was an appeal from an order of Mr. Registrar *Brougham* making a receiving order against *J. J. Wallace*, who had carried on business as a merchant and steamship broker in Great St. Helen's under the firm of *Wallace & Co.*

The petition on which the order was made was presented by *William Richards*, of Prince Edward's Island, Canada, and set out that the said *J. J. Wallace* was indebted in the sum of 800*l.* on a bill of exchange given to the said *William Richards* in payment for 32 shares in a certain ship.

The petition was signed "*William Richards* by his attorney *Thomas Picton Richards*," the signature being attested by a witness, and the attestation clause contained the words "signed by the petitioner by his attorney *Thomas Picton Richards* in my presence."

Amongst other objections to the validity of the receiving order it was urged that the bankruptcy petition could not be signed by an attorney on behalf of the petitioner; and further, even if this could be done the power of attorney in the present case did not authorize the attorney to sign a bankruptcy petition for his principal.

F. C. Willis for the appellant :

I wish first to call attention to the petition itself. The petition is signed "*William Richards*, by his attorney *Thomas Picton Richards*." Could *Thomas Picton Richards* sign this petition? Rule 125 of the Bankruptcy Rules, 1883, provides that "Every petition shall be fairly written or printed, or partly written and partly printed, and no alterations, interlineations, or erasures shall be made without the leave of the registrar, except so far as may be necessary to adapt a printed form to the circumstances of the particular case. A debtor's petition shall be in Form No. 4, and a creditor's petition shall be in Form No. 10, in the Appendix, with such variations as circumstances may require." And Form 10 provides, that the petition shall be signed by the petitioner, and the attestation clause contains the words "signed by the petitioner in my presence." But it is asserted that in the present case the petition could be signed by an attorney by virtue of a power of attorney given to *Thomas Picton Richards* by *William Richards*. Even if the petition could be signed by an attorney at all he must at any rate be properly and sufficiently authorized for that purpose, and in the present case I submit that the authority is not sufficient. This power is dated February 8th, 1879, and, amongst other things, empowers the said *Thomas Picton Richards*, on behalf of *William Richards*, "to commence and carry on, or to defend at law or in equity, all actions, suits or other proceedings touching anything in which I or my ships or other personal estate may be in anywise concerned," and further, gives him power to sign charter-parties, cheques, receipts and other instruments of a like nature, or to execute such other documents relating to his property as he shall see fit. There is no power to sign a bankruptcy petition, which has been done in this case. [*Counsel then proceeded to deal with other questions in relation to the validity of the petition founded upon the facts of the case.*]

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IN RE
J. J. WALLACE,
EX PARTE
WALLACE.

R. V. Williams, for the petitioning creditor, was not called upon.

BAGGALLAY, L. J., after dealing with the other circumstances of the case, said :—

The next question is—Could the petition be signed by attorney? Judgment.

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IN RE
J.J. WALLACE,
EX PARTE
WALLACE.

I have no doubt whatever that this could be done, provided a sufficient power of attorney was given. Here the words of the power give *Thomas Picton Richards* authority to carry on actions, suits or other proceedings in which the ships or other personal estate of *William Richards* may be in anywise concerned. That is, in my opinion, sufficient to authorize him to sign a bankruptcy petition. The power of an attorney to act on behalf of his principal in bankruptcy matters has been undisputed ever since the decision given by the Court of Appeal in *Ex parte Frampton*, *In re Frampton* (1 D. F. & J. 263), twenty-five years ago. The present case carries the principle a step further. In *Ex parte Frampton* it was held that the attorney was authorized to do an act, viz., to instruct a solicitor to show cause against an adjudication of bankruptcy. In this case we are deciding that the attorney is empowered to sign a document on behalf of his principal. But the signature of the document is the necessary form of commencing a proceeding in relation to something in which the principal or his personal estate is concerned. I am, therefore, of opinion that the decision of the registrar was right.

BOWEN, L. J. :

I am of the same opinion, and I have no doubt that the view expressed by the Lord Justice is the right view. The power of attorney was wide enough here to authorize the attorney to commence proceedings in bankruptcy by signing a petition.

FRY, L. J. :

I am entirely of the same opinion.

Appeal dismissed.

Solicitors : *J. T. Watson* for the appellant.

Hollams, Son & Coward for the petitioning creditor.

Case referred to :—

Ex parte Frampton, *In re Frampton*, 1 D. F. & J. 263; 28 L. J., B. 21.

PRACTICE.

IN RE WALKER & SON, EX PARTE NICKOLL & KNIGHT.

COURT OF
APPEAL.*Bankruptcy Appeals (County Court) Act, 1884, Section 2—Appeal from
Divisional Court—Leave to appeal.*BEFORE
BAGGALLAY,
L. J., BOWEN,
L. J., FRY,
L. J.
1884.

October 31.

Held: (1) That an application for leave to appeal under section 2 of the Bankruptcy Appeals (County Court) Act, 1884, from the decision of a Divisional Court sitting as a Court of Appeal from a County Court in bankruptcy, should be made in the first instance to a Divisional Court.

(2) That such application for leave to appeal ought to be made to the Divisional Court immediately after such Divisional Court has pronounced its decision.

THIS was an appeal from a decision of a Divisional Court of the Queen's Bench Division sitting as a Court of Appeal from a County Court in bankruptcy, under the Bankruptcy Appeals (County Courts) Act, 1884 (47 & 48 Vict. c. 9).

Section 2 of that Act provides that "An appeal shall lie in bankruptcy matters at the instance of any person aggrieved from the order of a County Court to a Divisional Court of the High Court of Justice, of which the judge to whom bankruptcy business shall for the time being be assigned shall, for the purpose of hearing such appeal, be a member. The decision of such Divisional Court upon any such appeal shall be final and conclusive, unless in any case it shall seem fit to the said Divisional Court or to the Court of Appeal to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive."

The case was originally heard before the Divisional Court, consisting of Justices MATHEW and CAVE, on June 25th last, and will be found reported *ante*, p. 188.

The appellants, Messrs. *Nickoll & Knight*, subsequently applied to the Court of Appeal under section 2 of the above Act for leave to appeal to that Court.

The Court of Appeal were of opinion, however, that such application should be made in the first instance to a Divisional Court.

On July 12th, therefore, the appellants applied *ex parte* to a

1884. Divisional Court consisting of Justices CAVE and A. L. SMITH,
by whom leave to appeal was given.
IN RE WALKER
& SON,
EX PARTE
NICKOLL &
KNIGHT.

Cohen, Q.C. (English Harrison with him) for the appellants.

Winslow, Q.C. (Yate Lee with him) for the respondent.

Winslow, Q.C.:

I have a preliminary objection. (1) The application for leave to appeal ought not to have been made *ex parte*. (2) The necessary leave to appeal ought to have been obtained from a Court composed of the same judges as those who decided the case.

BAGGALLAY, L. J.:

Judgment.

If it is necessary we could now give leave to appeal. At the same time we are of opinion that application for leave to appeal ought to be made to the Divisional Court as soon as its decision is given. There appears, indeed, to be nothing to prevent such application being made later, but it is manifestly the convenient course that the application should be made at the time, for then all the facts are clearly in the mind of the judges.

BOWEN, L. J., and FRY, L. J., concurred.

The case, after being opened at some length, was subsequently ordered to stand over as part heard until November 21st for the production of further evidence, on which day a compromise was arrived at with the sanction of the Court.

Solicitors: *Mercer & Mercer* for the appellants.

Waterhouse, Winterbotham & Harrison for the respondent.

PRACTICE.**IN RE DAY, EX PARTE THE TRUSTEE.***Application for costs of shorthand writer's notes.*

BEFORE
MR. JUSTICE
CAVE.
IN CHAMBERS.
1884.
November 8.

THIS was an application on behalf of the trustee in the bankruptcy of *J. W. Day* for an order that the costs of certain shorthand writer's notes should be allowed to such trustee.

The trustee in question was the successful respondent in a case, *In re Day, Ex parte Banner & Co.*, brought up on appeal to Mr. Justice CAVE in March last from an order of the registrar of the Leicester County Court, which appeal was dismissed "with all costs."

The question now was whether two sums of 8*l.* 2*s.* 4*d.* and 5*l.* 16*s.* 8*d.* paid by the respondent trustee for shorthand writer's fees for taking notes of the evidence on the examination of certain witnesses before the registrar should be allowed in his costs under the above-mentioned order of Mr. Justice CAVE dismissing the appeal. The taxing master had refused to allow these charges, on the ground that they were not expressly provided for by the order.

The application was now made that the appellants who had not been a party to the obtaining of the shorthand writer's notes might be ordered to pay for the same.

Sills for the trustee :

It was to the advantage of all persons that these notes should be taken. I ask that, if necessary, the order should be amended so as to include the costs of them. The case of *In re Albezette, Ex parte Smith* (L. R., 8 Ch. Div. 599; 48 L. J., B. 13; 38 L. T. 395), shows that the cost of shorthand writer's notes are, like other costs, in the discretion of the Court. If they had been specially mentioned at the time your Lordships would have specifically allowed them. Now it may be said it is too late, and the case of *De la Warr v. Miles* (L. R., 19 Ch. Div. 80) will probable be relied upon.

1884.

IN RE DAY,
EX PARTE
THE TRUSTEE.

Sidney Woolf contra :

Doubtless your Lordship might have ordered these costs, but the case of *De la Warr v. Miles* is now conclusive. That case provides that "the rule is now well settled that the costs of shorthand writers' notes of evidence will not be allowed on taxation unless a direction to that effect has been inserted in the order; for which special application must be made at the hearing. And such a direction will only be inserted in exceptional cases, the judges notes, supplemented by those of counsel, being in general a sufficient record of the evidence."

[CAVE, J.: It is a matter of convenience that the application should be made at the time, the facts are then fresh in the recollection of the Court. The rule is a good general rule, no doubt, but it is not a hard and fast one. If so it comes to this, that if a man makes a slip in not asking for the costs of the notes, he is to be fined for his mistake.]

The rule has always been followed in the Bankruptcy Court. The application is that the appellants should pay the costs, not that they should be paid out of the estate. In this case the appointment of the shorthand writer to take the notes was made on the application of the trustee alone.

Sills in reply :

The notes were necessary.

[CAVE, J.: You must satisfy me that the appellants were a party to the asking for the notes. If both the parties are agreed to the appointment of a shorthand writer then I agree that the losing party should pay the costs. If not, then I think that the party at whose instance the notes are taken should pay for them.]

CAVE, J. :

Judgment.

I am of opinion that this motion must be refused. In this case the application for a shorthand writer was made by the solicitor for the trustee, and there is no evidence whatever that it was concurred in by the appellants. Then the time when the costs of the notes might properly have been applied for was allowed to go by.

Now I do not say that in every case this delay would be fatal; I do not say that in every case I should necessarily refuse the costs because they were not asked for at the proper time. If all things are equal I do not think a mere slip of this kind should mulct the party who makes the mistake in costs. In the ordinary way where both parties agree to have a shorthand writer the loser must pay the costs. But here the appellants never consented at all. The application is, that the costs should be paid not out of the estate, but that the appellants should be compelled to pay for notes which they did not ask for, and which, primarily speaking, it is the duty of the Court to take for itself. I am of opinion that the motion must be refused.

1884.
IN RE DAY,
EX PARTE
THE TRUSTEE.

Motion refused with costs.

Solicitors: *Jackson & Smart* for the trustee.
S. M. & W. Benson.

Cases relied upon or referred to:—

In re Albesette, Ex parte Smith, L. R., 8 Ch. Div. 599; 48 L. J., B. 13; 38 L. T. 395; *De la Warr v. Miles*, L. R., 19 Ch. Div. 80; 45 L. T. 424.

PRACTICE.

IN RE BRIGHTMORE, EX PARTE MAY.

Bankruptcy Act, 1883, Section 95 and Section 97—Bankruptcy Petition presented in the wrong Court.

DIVISIONAL
COURT.
BEFORE
STEPHEN, J.,
CAVE, J.
1884.
November 12.

Held: That where a bankruptcy petition is presented in the wrong Court by inadvertence, such Court has jurisdiction to hear the petition and to make a receiving order.

THIS was an appeal from an order of the deputy registrar of the Greenwich County Court, dismissing a petition presented by one *May* against the debtor *Brightmore*.

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IN RE
BRIGHTMORE,
EX PARTE
MAY.

The facts were as follows:—

In July last *May* recovered judgment against *Brightmore* in an action in the High Court of Justice, and on this a bankruptcy notice was issued against the debtor from the Greenwich County Court, upon which a bankruptcy petition was presented in the same Court on August 6th.

The hearing of the petition was fixed for August 19th, and a short time previous to this date *Brightmore* called on his creditor, and stated that if a few days were given to him he expected to be able to raise the money.

For the convenience of the debtor the hearing of the petition was thereupon adjourned until September 2nd; but on August 29th a notice was received from him of his intention to dispute the petition, on the ground that he did not “reside or carry on business within the jurisdiction of the Greenwich Court,” and on this ground the petition was subsequently dismissed by the deputy registrar.

From this decision the petitioning creditor now appealed.

F. C. Willis for the petitioning creditor :

The address given in the heading of the various letters received from the debtor *Brightmore* states his place of business to be The Albert Works, North Woolwich. The bills given by him, which were dishonoured, and on which the action was brought, are made payable at his Albert Works, North Woolwich. It is admitted that North Woolwich is within the jurisdiction of the Greenwich County Court. But on examination of the ordnance map it appears that the Albert Works are about 100 yards out of the North Woolwich district, and are in reality in East Ham. Now, I submit, that when a *bonâ fide* mistake of this kind occurs there is a great difference under the present Bankruptcy Act of 1883, and the old Act of 1869. The intention of the legislature by the new Act was to cure those technicalities which tended to prevent the estate of a debtor being administered. The effect of section 8 of the Bankruptcy Act, 1869, and of Rule 26 of the Bankruptcy Rules, 1870, was that if the debtor did not reside or carry on business within the jurisdiction the petition was dismissed. But by section 95, sub-section (3), of the new Act of 1883, it is especially provided that nothing in this section “shall invalidate

a proceeding by reason of its being taken in a wrong Court." That section, I submit, was inserted to get over the difficulty which formerly existed. A petition is a proceeding in bankruptcy, and the obvious meaning of the sub-section is that if a creditor by inadvertence presents his petition in a wrong Court, that inadvertence shall not invalidate the proceeding. In the present case the debtor actually misled the creditor by saying that he carried on business in North Woolwich. Two courses were open to the deputy registrar and were pointed out to him (1) either to make the receiving order, or (2) to transfer the proceedings under section 97, sub-section (2), of the Act. He refused to take either course, but dismissed the petition. Sub-section (3) of section 95 must have a meaning, and the obvious meaning is that an irregularity of this kind may be got over if the Court should think just. The debtor admits the debt, and by this action of the registrar a delay of at least six weeks has taken place before the estate is administered, in direct contradiction to the intention of the new Act of 1883, which is, that the estates of insolvent persons may be administered as speedily as possible.

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IN RE
BRIGHTMORN,
EX PARTE
MAY.

E. Cooper Willis, Q.C. (Garrett with him) for the debtor :

There was no power to present the petition in the Greenwich County Court.

[STEPHEN, J. : The reasonable course would have been to have ordered a transfer under section 97, sub-section (2).]

I submit not. The words of sub-section (2) of section 97 are "Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one Court to another Court, or may by the like authority be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced." When proceedings are to be transferred, they must be transferred in the prescribed manner and by the prescribed authority, and by section 168—the interpretation clause of the Act—"prescribed" means "prescribed by general rules." The rules relating to

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IN RE
BRIGHTMORE,
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MAY.

transfer are Rules 16, 17 and 18, and those are the only rules under which a transfer can be made. Rule 16 provides that "where the judge of a County Court or the judge or a registrar of the High Court certifies that in his opinion a bankruptcy proceeding would be more advantageously conducted in some other Court, the registrar shall, if the opinion is certified before the first meeting of creditors, transmit the certificate to the official receiver, who shall lay the same before such meeting; and if it has been certified after such meeting, he shall transmit a copy of such certified opinion to the trustee, if there be one, and if not, to the official receiver, who shall thereupon summon a meeting of creditors to consider the same." [*Counsel also read Rules 17 and 18.*] The transfer must be by a certificate after a receiving order has been made; that is the only prescribed manner. Sections 95 and 97 of the Act are a statutory recognition of what was laid down in the case of *Revell v. Blake*, L. R., 7 C. P. 300. The section was not framed to protect parties who had taken proceedings in the wrong Court, but to protect proceedings which had culminated.

STEPHEN, J.:

Judgment.

Taking the two sections together I am of opinion that the registrar had jurisdiction to make a receiving order. The words of sub-section (3) of section 95 are not so clear as perhaps they might be, but they are sufficient to show that if he had made a receiving order it would not have been invalidated by reason of the proceedings being taken in the wrong Court. If he had made a receiving order, he then could have acted under section 97, sub-section (2). The whole objection seems to be of the smallest kind, and there is no reason why the matter should not have been decided in the Greenwich Court. We are decidedly of opinion that the registrar had authority to make the receiving order, the only question, is whether we should now make it or refer the matter back to him.

CAVE, J.:

I am of the same opinion. It seems to me that the section is framed to secure a case of this kind. A creditor may be in bona fide ignorance of the district in which the debtor resides. It is

one of those things which the Act was intended to get over. When, by inadvertence, the petition is presented in the wrong district, there is authority given to hear the petition. If this is done wilfully it would be otherwise, but in the present case there is no such suggestion. The proper course was for the registrar to hear the petition, and his order dismissing the petition was wrong. Then the question arises what we should do now. If nothing but this matter was before the registrar I am clearly of opinion that we ought to make the receiving order.

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MAY.

F. C. Willis :

The only point before the registrar was the question of jurisdiction; the debt was admitted.

After some discussion—

STEPHEN, J. :

We are of opinion that we should make a receiving order, and the debtor must apply for a review if he thinks fit.

Solicitors : *May, Sykes & Batten* for the petitioning creditor.

A. G. Ditton for the debtor.



DIVISIONAL
COURT.

BEFORE
STEPHEN, J.,
CAVE, J.
1884.

November 12.

IN RE RIDDEOUGH, EX PARTE VAUGHAN.

Bankruptcy Act, 1883, Section 4, Sub-section (1) (a), and Section 43—Act of Bankruptcy—Assignment of Property to Trustee for Benefit of Creditors generally—Subsequent Bankruptcy of Debtor—Liability of Trustee under the Deed of Assignment to account to Trustee in the Bankruptcy.

Held: (1) That where a debtor has assigned the whole of his property to a trustee for the benefit of his creditors generally, and such trustee has taken possession of the property and carried on the debtor's business, in the event of the debtor subsequently being adjudged bankrupt on a petition founded on the act of bankruptcy committed by the execution of the deed of assignment, the trustee in the bankruptcy must elect to treat the trustee under the deed either as his agent or as a trespasser.

(2) If the trustee in the bankruptcy elects to treat the trustee under the deed as a trespasser, he can only claim from him any property of the bankrupt which remains in his possession unconverted, and the value, at the time when he took possession, of any property which he has taken possession of and has converted.

COMPARE the case of *In re Richards, Ex parte The Trustee*, ante, p. 242.

THIS was an appeal from an order of the learned judge of the Manchester County Court, by which *H. Vaughan*, the appellant, was directed to pay the sum of 293*l.* 1*s.* 6*d.*, being the amount admitted to be received by him under a certain deed bearing date in February last, and also to hand over certain goods mentioned in the said deed to the official receiver of the said County Court.

On February 14th the bankrupt *Riddeough* executed a creditor's deed, by which he assigned all his property to *Vaughan*, who is an accountant, as trustee for the benefit of the creditors generally. The deed further provided that *Vaughan* should realize the estate, but in the meantime until the sale that he should carry on the debtor's business as a baker, and eventually divide the proceeds as they would be divided in a bankruptcy.

This deed was executed by a large majority of the creditors, and *Vaughan* went into possession of the property, made various necessary payments for wages, and also purchased flour, yeast and other things necessary for carrying on the business.

Vaughan continued in possession from February to April, but on

February 18th, four days after the deed was executed, a creditor who had not assented to it presented a petition in bankruptcy against *Riddeough*, the execution of the deed being the act of bankruptcy on which the petition was founded.

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RIDDEOUGH,
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The debtor was afterwards adjudicated bankrupt, and the official receiver, Mr. *Dibb*, became trustee in the bankruptcy, and he thereupon called upon *Vaughan* to account to him. On his application the County Court judge made an order directing the whole of the admitted receipts, amounting to 293*l.* 1*s.* 6*d.*, to be paid over.

From this order *Vaughan* now appealed.

Bigham, Q.C. (*C. A. Russell* with him) :

The contention of the official receiver is that the receipt side only of the account must be looked to, and no allowance whatever ought to be made for payments. The admitted receipts were 293*l.* 1*s.* 6*d.*, and the whole of this the County Court judge ordered to be paid over. But the account shows on the other side that the trustee has expended more than this in paying wages, &c., and in purchasing goods, such as flour, &c., necessary to carry on the business. Surely the trustee is not entitled to the price received for the loaves made with the flour bought on Mr. *Vaughan's* credit. The effect of the order appealed against is that the trustee has to pay over to the official receiver the whole of the 293*l.*, and to deliver to him all the property of the bankrupt which is in his possession, thus leaving him to pay out of his own pocket all the expenses which he has incurred, including the cost of the flour which has been used in making the bread which he has sold and accounted for. The injustice is manifest. Whether *Vaughan* is entitled, however, to deduct proper expenses in carrying on the business, I feel there is a difficulty. It will be said that he was a mere volunteer and acted at his own peril. There is no suggestion that *Vaughan* was guilty of improper conduct. Is it right that he should pay for what he did at the instigation of the bankrupt in whose shoes the trustee now stands? I submit that he should be allowed proper costs. I submit, at all events, that the County

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 IN RE
 RIDDELOUGH,
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Court judge was wrong in ordering that all the money should be paid over.

Sir *Farrer Herschell*, Solicitor-General (*Pankhurst* with him), for the official receiver :

I wish to point out first the position of *Vaughan*. He was simply dealing with the property of the bankrupt with full notice of the act of bankruptcy. He is certainly not entitled to any consideration. The deed was an attempt to defeat the operation of the bankruptcy law and the trustee. I submit that, if by mixing his own money with the property of the trustee *Vaughan* has run the risk of loss, it is his own fault. No proper accounts have been rendered, all the money is mixed up, and it is only now contended that certain goods have been bought by *Vaughan's* money and on his credit, and were never the property of the debtor at all. On one side of the account rendered is a long list of "receipts" and on the other side "payments": that is all. I say that Mr. *Vaughan* must pay to us all receipts in respect of the bankrupt's property, and is not entitled to charge us anything.

[STEPHEN, J.: You must say whether you adopt him as your agent, or whether you hold him as a trespasser. In the latter case you can only claim from him any property of the bankrupt which remains in his possession unconverted, and the value, at the time when he took possession, of any property which he has taken possession of and has converted.]

I say that he took possession of the shop as a wrongdoer, and I say that he must account to us for all that then came into his possession. I submit, also, that the inquiry, if one is ordered, should be at the expense of Mr. *Vaughan*.

[CAVE, J.: It would be a very dangerous thing to direct any inquiry at the expense of a particular individual beforehand.]

STEPHEN, J. :

Judgment.

There will be an order discharging the order of the County Court so far as it ordered the payment of the 293*l.*, and directing an inquiry as to the property of the debtor which has been taken

possession of and converted by Mr. *Vaughan*. All costs will be reserved.

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RIDDEOUGH,
EX PARTE
VAUGHAN.

CAVE, J., concurred.

Solicitors: *Pritchard, Engelfield & Co.*, agents for *Boote & Edgar*,
Manchester, for the appellant.
The Official Receiver in Bankruptcy.

IN RE CAMPBELL, EX PARTE WOLVERHAMPTON AND
STAFFORDSHIRE BANKING COMPANY.

DIVISIONAL
COURT.

BEFORE
STEPHEN, J.,
CAVE, J.
1884.

*Bankruptcy Act, 1883, Section 43—Illegal Consideration—Payment of Money
belonging to the Bankrupt to procure Withdrawal of Criminal Prosecution
against him—Right of Trustee in the Bankruptcy to recover.*

November 12.

Where money belonging to a debtor was paid to procure the withdrawal of a criminal prosecution against him, and the debtor was subsequently adjudged bankrupt under a petition founded on an act of bankruptcy of which the party to whom the money was paid at the time of receiving it had notice:

Held: That the consideration for which the money was paid was illegal; and that the trustee in the bankruptcy was entitled to recover it.

THIS was an appeal against an order of the County Court judge of Staffordshire declaring that two sums, amounting together to 106*l.* 14*s.*, constituted part of the estate of the bankrupt; and further ordering that the Wolverhampton and Staffordshire Banking Company should forthwith pay the said sums over to the official receiver of the said County Court.

From the facts it appeared that on December 15th, 1883, the debtor *David Campbell* had certain communications with the said banking company with regard to the cashing of certain cheques. This the bank declined to do without cover, but an agreement was finally come to by which, in consideration of the cheques being cashed, *Campbell* promised to pay 10*l.* within two days and to obtain security. *Campbell* failed to carry out this engagement,

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 IN RE
 CAMPBELL,
 EX PARTE
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 STAFFORD-
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 ING COMPANY.

however, and subsequently filed his petition in liquidation, thereby committing an act of bankruptcy, upon which the banking company issued a summons against him under section 13 of the Debtors' Act, 1869, for obtaining credit under false pretences.

On January 10th, 1884, after the issue of the summons, a Mr. *Hunter* called at the bank, and after some conversation it was arranged that if the permission of the stipendiary could be obtained the company should withdraw from the prosecution, and *Hunter* thereupon signed an undertaking to pay them the money. The proceedings against *Campbell* were accordingly withdrawn, and the money handed over by *Hunter* to the banking company.

The liquidation proceedings subsequently fell through. A petition under the Bankruptcy Act, 1883, was presented against *Campbell* founded upon the previous act of bankruptcy of which the bank had notice, and the official receiver entered into possession of his estate as trustee.

It was then discovered that the money which *Hunter* had paid to the bank had been previously handed to him by the bankrupt's wife, she having, with the bankrupt's knowledge, taken it for the purpose of paying the bank out of a bag of money belonging to the bankrupt, and upon this the learned County Court judge held that the official receiver as trustee was entitled to recover it, and made the order accordingly.

From this order the banking company now appealed.

E. Cooper Willis, Q.C. (Plumptre with him), for the banking company :

Hunter said when he came to the bank that he was not the agent of the bankrupt. In a case of this kind, also, there is a great difference between money and goods.

[CAVE, J. : If money is earmarked it can be followed as well as a book or a piece of furniture.]

The bank had a right to receive from *Hunter* money which he purported to give them as his own money. The bank manager believed that *Hunter* was paying the money out of his own pocket.

[CAVE, J. : *Hunter* had no title whatever to the money.]

He gave a written undertaking to the bank to pay.

[STEPHEN, J. : The whole affair appears fraudulent throughout. It looks very like a fraud upon the creditors.]

Several affidavits were here read, from which it appeared that, at the interview with the manager of the bank, Hunter said "Mrs. Campbell is a favourite niece, and I do not wish her to be troubled. If you can withdraw the case I will find the money."

[CAVE, J. : There is consideration. That consideration is the stifling proceedings for misdemeanor. Have you any authority by which you can show that an agreement to put a stop to public proceedings is a good consideration for the payment of money ?]

Winslow, Q.C. (J. Linklater with him), for the official receiver, were not called on.

STEPHEN, J. :

The view I take is, that as between *Hunter* and the bank there Judgment. was no good consideration because it was a corrupt contract. In argument it has been put more delicately. I think that *Hunter* gave the bank no better title than he got. He got no title. He was substantially *Campbell's* agent. Then there is another thing. It is quite obvious the intention was to cheat the creditors of *Campbell*—to divert 106*l.* from the creditors. I do think that *Hunter* was committing an offence against the bankruptcy laws. *Hunter* got no title : he gave none to the bank, and the bank must refund the money.

CAVE, J. :

I am of the same opinion. A prosecution had been instituted against the bankrupt on good or bad grounds. I assume in favour of the bank the ground was an honest one. Then *Hunter* comes upon the scene and an arrangement is arrived at by which he is to pay the money if the bank will withdraw. That was an illegal contract, utterly illegal. It was interfering with the course of justice. There was no consideration for the promise of *Hunter* to pay the money. But then it appears that the money paid was not

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Hunter's money at all. It was the money of the trustee; it had ceased to be *Campbell's* because he had committed an act of bankruptcy. There are some cases when money even when earmarked cannot be recovered—when it has passed in ordinary business as current coin. But in this case *Hunter*, by merely paying over to the bank, has given no title to the bank; there was an invalid consideration. The only reason why *Hunter* could not recover it was because he was *in pari delicto*. I am entirely of opinion that the County Court judge was right in ordering the money to be paid to the trustee.

Appeal dismissed with costs.

Solicitors: *Ullithorne, Currey & Villiers*, for the appellant.
Clarke, Woodcock & Ryland, for the trustee.

PRACTICE.

DIVISIONAL
 COURT.

BEFORE
 MATHEW, J.,
 CAVE, J.
 1884.

November 20.

IN RE TAYLOR, EX PARTE THE BOARD OF TRADE.

Bankruptcy Act, 1883, Section 18—Bankruptcy Rules, 1883, Rules 163 and 249—Composition—Business carried on by the Official Receiver—Expenses a First Charge on the Assets.

Held: That where, before a composition is approved by the Court, the business of the debtor is carried on by the official receiver, who makes payments out of his own pocket, and incurs personal liability for the purpose of carrying on such business, the proper order for the Court to make on approving the composition is, that the official receiver shall forthwith deliver up possession of the debtor's estate to the trustee under the composition, and that such trustee shall pay to the official receiver what may be found due to him out of the first assets which come into his hands.

THIS was an appeal on behalf of the official receiver against an order of the learned judge of the Leeds County Court.

In July last a bankruptcy petition was presented by a creditor

against the debtor *Taylor*, and on August 6th a receiving order was made against him.

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IN RE TAYLOR,
EX PARTE
THE BOARD OF
TRADE.

On August 20th the first meeting of creditors was held, when a composition of 12s. 6d. in the pound was offered. This composition was duly confirmed at a subsequent second meeting of the creditors, and on September 23rd was approved by the Court.

The composition resolutions provided that the costs of the petitioning creditor and all other costs, charges and expenses of and incidental to the proceedings should be paid in full on the approval of the Court being given, and that until full payment of the composition the property should be vested in a trustee for the creditors.

On the approval of the composition the trustee applied to the official receiver to deliver over to him the property of the debtor; but the official receiver declined to do this unless he was first paid a sum amounting to 131l. 2s. 6d., which he had expended out of his own pocket in the purchase of goods for the purpose of carrying on the business of the debtor, between the date of the receiving order and the approval of the composition by the Court.

Subsequently, however, before the hearing of the motion made by the trustee to County Court the official receiver offered to hand over the property on the trustee undertaking to pay out of the first assets which came into his hands the money due to him, but this offer was declined.

At the hearing the County Court judge made an order directing the official receiver forthwith to deliver up the debtor's property to the trustee, the trustee undertaking to pay or indemnify the official receiver out of the assets in due order of priority what might be found due to him for goods purchased for the carrying on of the debtor's business, and paid for by the official receiver, or for which he was personally liable.

From this order the official receiver now appealed, and asked that he should be entitled to retain possession of the property until he was reimbursed the amount due to him for the goods which he had purchased: or security was given by the trustee for the reimbursement thereof: or, in the alternative, that the trustee might be ordered forthwith to reimburse the official receiver.

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 IN RE TAYLOR,
 EX PARTE
 THE BOARD OF
 TRADE.

Sir *Farrer Herschell*, Solicitor-General (*Muir Mackenzie* with him), for the official receiver :

In order to carry on the business the official receiver was compelled to make these payments. I ought, perhaps, to read the rules relating to this subject, but I do not think they affect the present decision. Rule 163 of the Bankruptcy Rules, 1883, provides that "where a composition or scheme is sanctioned the official receiver shall forthwith put the debtor (or, as the case may be, the trustee under the composition or scheme) into possession of the debtor's property. The Court shall also rescind the receiving order." And by Rule 249, "(1) Where a composition or scheme is sanctioned by the Court, the official receiver shall account to the debtor, or, as the case may be, to the trustee under the composition or scheme. (3) If the debtor, or, as the case may be, the trustee, is dissatisfied with the account or any part thereof, he may report the matter to the Board of Trade, who shall take such action (if any) thereon as it may deem expedient." By these rules the official receiver is directed to deliver up possession and to account to the trustee. He was always ready to do this. But under the circumstances of the case before doing so he was surely entitled to take such steps as would avoid any risk of his being out of pocket. He had ordered the goods and was responsible for them. Before delivering up possession of them he was, at any rate, entitled to be indemnified.

Herbert Reed for the trustee :

As a matter of fact when the composition was sanctioned the official receiver refused to deliver any goods until the trustee personally gave him a cheque for the goods which had been bought by him. The trustee is perfectly willing to pay as soon as he has assets in his hands, but at present he has none.

[CAVE, J. : These expenses were incurred with the full knowledge of the debtor and of the trustee.]

The trustee was not appointed then. There is more in the case than appears at first sight. It involves an important question of

principle. It seems to have been the practice of official receivers all over the country to demand personal payment by the trustee as a condition precedent to handing over the estate.

1884.
IN RE TAYLOR,
EX PARTE
THE BOARD OF
TRADE.

[*A letter was here produced by the Solicitor-General to show that the official receiver had offered to be satisfied with an undertaking that his expenses should be a first charge upon the assets.*]

I would call attention to the position of the trustee and the official receiver. The official receiver is in no better a position than a receiver appointed by the Court. In *Ex parte Izard, In re Bushell* (L. R., 23 Ch. D. 75; 52 L. J., Ch. 678; 48 L. T. 751), it was held that "Under Rule 5 of the Bankruptcy Rules, 1871, the charges of a receiver and manager of a business for disbursements out of pocket (*e. g.*, travelling expenses and salaries of assistants) are liable to taxation. A receiver and manager of a business who desires to advance money of his own for the purposes of the business may, before doing so, apply to the Court for its authority, and the Court will, as a general rule, allow him interest at 5 per cent. on the amount which it authorizes him to advance, and will give him a charge on the debtor's assets for the advance and the interest. If the receiver and manager advances money without such previous authority, he is entitled to an indemnity out of the assets, but he cannot obtain a personal order against the trustee for payment." The official receiver, therefore, has no claim to immediate payment, but only to an indemnity out of the assets. The position of the official receiver also, and his duties as to the debtor's estate, are fully defined in section 70 of the Bankruptcy Act, 1883. He has no right to burden the estate without the permission of the creditors or of the Board of Trade.

MATHEW, J.:

I am of opinion that the order of the County Court judge in Judgment. this case was wrong, and that it must be varied by striking out the undertaking and the words "due order of priority," and substituting a direction that the trustee shall, out of the first assets which come into his hands, pay to the official receiver whatever may be found due to him for the goods supplied for the carrying

1884.
IN RE TAYLOR,
EX PARTE
THE BOARD OF
TRADE.

on of the business. It has been argued on behalf of the trustee that the original order would have given to the official receiver all that he now claims, and this, doubtless, was the original intention of the creditors. But the trustee took a different view of the circumstances. In that view he was entirely wrong, and the persistency with which he adhered to it is now excused on the ground the question in dispute was one of principle. Now I have found in my experience that in the majority of cases involving deep principle, the question of principle in reality turns out to be a question of temper or it may be a question of costs. It is true the official receiver appears in the first instance to have taken up a different position from that which has been taken for him here to-day. He apparently did demand an undertaking from the trustee as a condition precedent to handing over the property. But in the letter of October 24th he gave up that position and intimated that he would be willing to accept and would be satisfied with a first charge upon the assets. That offer was not accepted, and the matter was brought before the Court. With all due respect to the order of the learned County Court judge, we are of opinion that it was not expressed in the clearest terms, and that it should be varied as I have said. The position of the official receiver was very similar to that of a receiver in the Court of Chancery, and it is clear that under such circumstances as these such a receiver would be entitled to be paid out of the first assets which came to hand. With regard to the question of costs, we are of opinion that the case ought never to have come into the Court below, and certainly ought not to have come into this Court. The trustee, being in the wrong, must, therefore, pay all costs.

CAVE, J. :

I am entirely of the same opinion.

Order varied accordingly.

An application made by *Herbert Reed* for leave to appeal was refused by the Court.

November 21st.

On this day *Herbert Reed* renewed his application for leave to

appeal in the Court of Appeal before Lords Justices BAGGALLAY, BOWEN and FRY, when that Court ordered the application to stand over until they had had an opportunity of consulting the judges before whom the case was heard.

1884.
IN RE TAYLOR,
EX PARTE
THE BOARD OF
TRADE.

November 26th.

BAGGALLAY, L. J., said :—

We have consulted the judges of the Divisional Court in this case, and have ascertained from them that it was not their intention to decide any question of principle but that their decision was simply founded on the particular facts of the case. Leave to appeal must therefore be refused.

BOWEN, L. J., and FRY, L. J., concurred.

Leave to appeal refused.

Solicitors: *The Solicitor to the Board of Trade* for the official receiver.

A. Scott Lawson for the trustee.

PRACTICE.

IN RE RHODES, EX PARTE HEYWORTH.

Bankruptcy Act, 1883, Section 7, Sub-section (4)—Act of Bankruptcy—Failure to comply with a Bankruptcy Notice to pay Judgment Debt—Appeal pending from Judgment—Discretion of Registrar.

COURT OF
APPEAL.

BEFORE
BAGGALLAY,
L. J.,
BOWEN, L. J.,
FRY, L. J.

1884.

November 21.

Held: That where a bankruptcy petition is presented by a creditor founded on an act of bankruptcy committed by the failure of the debtor to comply with the terms of a bankruptcy notice to pay a judgment debt, and an appeal is pending from such judgment, it is a matter of discretion for the Registrar whether he will make a receiving order, or stay the proceedings, and the Court of Appeal will not interfere unless such exercise of discretion is clearly wrong.

THIS was an appeal from an order of Mr. Registrar *Hazlitt*, by which he refused to make a receiving order against *Christopher Herman Rhodes*.

1884.

IN RE RHODES,
EX PARTE
HEYWORTH.

The order appealed against was in the following terms:—

“In the matter of a Bankruptcy Petition filed the 15th day of October, 1884. Upon the hearing of this petition . . . and upon hearing counsel . . . and it appearing that an appeal brought by the said debtor is now pending in relation to the judgment on which the bankruptcy notice herein is founded, it is ordered that the further hearing of this petition be adjourned generally, with liberty to apply.”

The affidavit of the petitioning creditor, *Eli Heyworth*, as to the debt stated “that the said *Christopher Herman Rhodes* was, on and before the filing of the said petition, and still is, justly and truly indebted unto me in the sum of 138*l.* 3*s.* 4*d.*, being as to part thereof, viz. 104*l.* 6*s.*, the amount due on a final judgment obtained by me against the said *Christopher Herman Rhodes* in the High Court of Justice, dated July 8th, 1884, whereon execution has not been stayed. And as to 33*l.* 17*s.* 4*d.*, the remainder thereof, being the amount of taxed costs of, and occasioned by, an application for a rule of the High Court of Justice, Queen’s Bench Division, and dated July 8th, 1884, ordering a writ of prohibition to issue, directed to the Lord Mayor of London and the said *Christopher Herman Rhodes*, to prohibit them from further proceeding in a certain action in the Mayor’s Court.”

The facts were shortly as follows:—

On April 7th, 1883, the said *Christopher Herman Rhodes* obtained a verdict for 96*l.* damages against the said *Eli Heyworth* and one *J. Hawkins* in an action for wrongful dismissal brought by him in the Lord Mayor’s Court.

The said *Eli Heyworth* thereupon commenced proceedings in prohibition on the ground that the alleged cause of action had not arisen wholly or in part within the jurisdiction of the Lord Mayor’s Court, and an action of prohibition having been tried in the High Court of Justice before Mr. Justice *HAWKINS* and a jury, and the jury having found certain issues of fact in favour of Mr. *Heyworth*, the learned Judge, on July 8th, delivered a written judgment to the effect that the cause of action upon which the said *Christopher Herman Rhodes* had sought to recover in the Mayor’s Court had not arisen within its jurisdiction, and he directed that judgment in such action should be entered for Mr. *Heyworth* with costs, and

further ordered that the sum of 96*l.*, which had been paid into Court during the proceedings in prohibition, should be paid out to him.

1884.
IN RE RHODES,
EX PARTE
HEYWORTH.

In pursuance of this verdict and judgment a formal judgment was entered on July 8th, 1884, and the costs taxed thereunder amounted to 104*l.* 6*s.*

The Judge and jury having found the issues in the action in favour of Mr. *Heyworth*, Mr. Justice HAWKINS, sitting by consent as a Divisional Court, directed a writ of prohibition to issue prohibiting further proceedings in the action in the Mayor's Court, and also directed the said *Christopher Herman Rhodes* to pay the costs of the application therefor, which were afterwards taxed at 33*l.* 17*s.* 4*d.*

The above-mentioned sums not having been paid, a bankruptcy notice was served upon the debtor, upon which the petition was founded, but an appeal having been lodged on behalf of the debtor in relation to the judgment, the Registrar refused to make a receiving order and made an order in the terms above set out.

From this refusal the petitioning creditor now appealed.

Rolland, for the petitioning creditor :

The Registrar ought to have made the receiving order ; or, at any rate, if he adjourned the hearing, he ought to have required security to be given for the debt.

Mirams, for Rhodes, was not called on.

BAGGALLAY, L. J. :

It was always the recognised practice under the Bankruptcy Act of 1869, and I see no reason why it should not be under the Act of 1883, that where a petitioning creditor's debt is a judgment debt, if an appeal is pending, it is a matter of discretion for the Registrar whether he will make a receiving order or stay the proceedings. In this case the petitioning creditor's debt is an amount payable to *Heyworth* by reason of proceedings in prohibition. Against that order in prohibition an appeal is pending, and the possible effect of that appeal may be that there may turn out to be no petitioning creditor's debt at all. Assuming it to be a good petitioner's debt, it may be got rid of. In my opinion the Registrar exercised a Judgment.

1884. very wise discretion. The order of the Registrar was "that the further hearing of this petition be adjourned generally, with liberty to apply." I am clearly of opinion that such an order was right.

IN RE RHODES,
EX PARTE
HEYWORTH.

BOWEN, L. J. :

I am of the same opinion. If the appellant is right in his view, I am not at all satisfied that a person who has obtained an order after a trial in prohibition becomes a creditor who has obtained a final judgment under the Act. I do not now express a definite opinion upon this point. It is open to argument, but the doubt arises in my mind. In the present case, however, the order of Mr. Justice HAWKINS is under appeal. Sub-section (4) of section 7 of the Bankruptcy Act, 1883, provides that "when the act of bankruptcy relied on is non-compliance with a bankruptcy notice, to pay, secure or compound for a judgment debt, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment." The Court has ample discretion, and it is impossible for us to interfere unless we are quite sure the Registrar is wrong.

FRY, L. J. :

I am entirely of the same opinion.

Solicitors: *Shaw & Tremellen* for the appellant.

Walker, Son & Field for the debtor.

BEFORE
MR. JUSTICE
CAVE.

1884.
November 24.

IN RE G. & A. MAHLER, EX PARTE HONYGAR.

IN RE G. & A. MAHLER, EX PARTE CHARBIN.

The Court does not sit to assist the official receiver or the trustee in simple matters relating to the management of the estate, but it sits for a judicial purpose; and where there is no question of law arising, there is no justification for coming to the Court.

The official receiver must be prepared to undertake the proper responsibility of his position, and he has no right in a simple case to come to the Court merely for information.

THESE cases arose out of the same bankruptcy, and were of the same nature.

In each case the application was that the official receiver, or the

special manager appointed in the bankruptcy of *G. & A. Mahler*, might be ordered forthwith to deliver up to the applicants certain pieces of silks and velvets and other goods, &c., which were or might be on the premises of the bankrupts, or in the possession of the official receiver; and that the costs of the application be paid out of the estate.

1884.
IN RE G. & A.
MAHLER,
EX PARTE
HONYGAR.
IN RE G. & A.
MAHLER,
EX PARTE
CHABBIN.

The debtors, *G. & A. Mahler*, carried on business at 3 and 4, Milk Street, E.C., as agents for a number of manufacturers on the continent, and in that capacity the silk and other goods now sought to be recovered had come into their hands.

On or about November 6th they absconded, and a receiving order had since been made against them.

Herbert Reed for the applicants.

The applicants entrusted the debtors with goods manufactured by them as their agents. It was the duty of the debtors to find purchasers for such goods. The goods so entrusted to the debtors were invoiced by the consignors to themselves at 3 and 4, Milk Street, and the invoices of the goods to the purchaser bore the name of the consignor. All payments for such goods were made by cheque drawn by the customer in favour of the consignor, and it was the duty of the debtors to forward such cheques to any consignor on the day on which they received them. The goods of each person entrusted to the debtors in this way were kept separate and distinct. Each principal had a separate set of books. Every step in the transactions was distinct, and the goods are separately marked. Application has been made for the delivery up of the goods to which the consignors are, under the circumstances, justly entitled, but such delivery was refused on the ground that the official receiver and the special manager who has been appointed desired to ask the opinion of the Court.

Macdonnel for the official receiver.

The official receiver will submit to any order of the Court. The reasons which induced the official receiver not to give up the goods when application was made to him are intelligible. The goods are very valuable, and when the application was made no statement of affairs had been given. The official receiver did not know

1884.
 IN RE G. & A. MAHLER,
 EX PARTE
 HONYGAR.
 IN RE G. & A. MAHLER,
 EX PARTE
 CHARRIN.

what claim the creditors might have to the goods. He is now willing that they should be given up. The only question is that of costs.

Herbert Reed :

I only ask for costs out of the estate. We have been put to the expense of coming here. The applicants have a legal right to these goods.

[CAVE, J. : Of course the official receiver must have a certain time to acquaint himself with the facts.]

The official receiver said he wished to take the opinion of the Court.

CAVE, J. :

Judgment.

I am of opinion that there might be good reason for the official receiver asking for a short delay to acquaint himself with the facts, but I cannot see any reason for bringing the matter to the Court. There was nothing to bring before the Court. I altogether refuse to accede to the proposition that the official receiver should tell the other side that it is necessary to come to the Court in cases where there is no difficulty. The only difficulty here was that the official receiver wanted more time. I altogether object to the Court being called upon to decide nothing at all. Clearly the applicants are entitled to have costs out of the estate; my only doubt is whether the official receiver ought to have his. The official receiver must be prepared to undertake the proper responsibility of his position. He has no right in a simple case to come to the Court merely for information. I will make an order, however, for costs out of the estate.

Solicitors : *Phelps & Co.* for the applicants.

W. W. Aldridge for the official receiver.



IN RE PARKER AND PARKER, EX PARTE TURQUAND.

BEFORE
MR. JUSTICE
CAVE.
1884.*Bankruptcy Act, 1883, Section 55, Sub-section (6)—Disclaimer—Landlord—Vesting Order.*

November 24.

Quære: Whether the words of sub-section 6 of section 55 of the Bankruptcy Act, 1883, are intended to apply to a landlord.

THIS was an application on behalf of the trustee in the bankruptcy of Messrs. *Parker & Parker*, the well-known solicitors of Bedford Row, for leave to disclaim all the right and interest in the lease of certain property known as Fisher's Hotel, Bond Street, under section 55 of the Bankruptcy Act, 1883.

Messrs. *Parker & Parker* were originally the mortgagees of the above-mentioned premises, and in 1879 they deposited the deeds with their bankers, Messrs. *Coutts & Co.*, as security for an advance then made.

In July, 1881, they obtained a sublease of the premises from the Baron *d'Almeida*, the superior landlord, and subsequently, on September 15th, 1882, they entered into an agreement with one *Imperiali* to let the premises to him for a term of years with the option of purchasing the fee, to which agreement the Baron *d'Almeida* was a party.

In August last the case was before the Court, and an extension of time was then given to the trustee in which to exercise his option of disclaimer.

The trustee now asked leave to disclaim the property.

E. Cooper Willis, Q.C. (*J. Linklater* with him), for the trustee, read several affidavits in support of the application.

R. V. Williams for Mr. *Imperiali*:

I ask that if leave to disclaim is granted, it may be granted without prejudice to the right of Mr. *Imperiali* to prove for any injury which may be caused to him by the disclaimer.

1884.

F. C. Willis for Baron d'Almeida :

IN RE PARKER
& PARKER,
EX PARTE
TUBQUAND.

I appear for the superior landlord, Baron *d'Almeida*, and I am instructed to apply, in the event of leave to disclaim being given, for an order vesting the property in Baron *d'Almeida*, under sub-section (6) of section 55. Sub-section (6) provides that "The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just ; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

"Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in, and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt." In this case, unless a vesting order is made in favour of Baron *d'Almeida* persons claiming as mortgagees may put the superior landlord to much inconvenience.

[CAVE, J. : Does the sub-section apply to the landlord? The

proper course seems to be to make such an order as, without being a vesting order, would exclude them.]

1884.

IN RE PARKER
& PARKER,
EX PARTE
TUBQUANT.

I care not which course is taken by your Lordship. The words of the sub-section, however, are—"by *any* person." The latter part of sub-section (6) deals with persons claiming under the bankrupt, and that would seem to imply that in the first part some one else was intended. Assuming that your Lordship thinks the mortgagees should be excluded, I submit that the simplest course is to give the landlord a vesting order. The mortgagees have been served with notice. There is no great difference between an order barring them and an order vesting the property in the landlord.

CAVE, J. :

I do not think this is a case in which a vesting order should be Judgment. made. I am not sure that the words "any person claiming any interest in any disclaimed property" apply to a landlord. This is a lease. What is disclaimed is a term of years. That the landlord has no interest in. The Act says, "in any disclaimed property." It does not say any property to which the disclaimer may relate. I think the proper course will be to exclude the mortgagees from all interest in and security upon the property unless they shall themselves within a week declare their option to take a vesting order under sub-section (6). The order will be: Leave to the trustee to disclaim. Mr. *Imperiali* and the landlord being at liberty to prove for any damage done to them by the disclaimer, with costs out of the estate. I feel compelled to remark, however, for the second time, that the Court does not sit to assist the official receiver or the trustee in the management of the estate, and they ought not to come here for that purpose. The Court sits for a judicial purpose. When there is no legal question between the parties, there is no justification for coming to the Court.

Solicitors : *Linklaters & Co.* for the trustee.

Reyroux, Phillips & Co. for Mr. *Imperiali*.

H. Montagu for Baron d'Almeida.



PRACTICE.

BEFORE
MR. JUSTICE
CAYE.
1884.

IN RE GILLESPIE & CO., EX PARTE MORRISON
& AITCHESON.

December 1. *Bankruptcy Rules, 1883, Rule 173 and Rule 174—Rejection of Proof—Appeal.*

Held: That where the trustee rejects a proof tendered by a creditor, and from such rejection an appeal is brought, it is not sufficient to apply to the Court within the twenty-one days limited by Rule 174 of the Bankruptcy Rules, 1883, to fix a day and time for the hearing of the appeal, but notice of motion in the usual way must be served on the trustee within the twenty-one days.

THIS was an appeal from the rejection of a proof by *J. Young*, the trustee in the bankruptcy of *Messrs. Gillespie & Co.*

F. C. Willis in support :

My first point is this. The proof which has been rejected was made on May 24th, 1884, and was filed on the 26th of that month. Rule 173 of the Bankruptcy Rules, 1883, provides that, "subject to the power of the Court to extend the time, the trustee, within fourteen days after receiving a proof, shall, in writing, either admit or reject it wholly or in part, or require further evidence in support of it." That was not done.

Yate-Lee for the trustee :

If my friend takes a technical objection, then I take a technical objection also, and object to his being heard at all. On September 30th, 1884, the trustee rejected the proof. Rule 174 provides that, "subject to the power of the Court to extend the time, no application to reverse or vary the decision of an official receiver or trustee in rejecting a proof, shall be entertained after the expiration of twenty-one days from the date of the decision complained of." That was not done ; and if *Mr. Willis* claims under Rule 173, so I claim under Rule 174.

F. C. Willis :

Your Lordship will see on the file the date of our application to the Court to fix a day and time for the hearing of our appeal. That date is October 20th. Rule 174 says, "No application to reverse . . . shall be entertained, &c." On October 20th all that it is necessary to do was done. It is the Court that we have to deal with.

1884.
IN RE GIL-
LESPIE & Co.,
EX PARTE
MORRISON &
AITCHESON.

[CAVE, J.: You must bring yourself within the Act. You must give notice of motion within the twenty-one days.]

Does your Lordship say that in case it happens that notice disputing or rejecting a debt is received, and an application is made to the Court to fix a day, and the Court does not give a day until the twenty-one days have elapsed, the appellant is out of time?

CAVE, J. :

That is not likely to occur, and when it does occur I will decide it. I will now give you an extension to proceed with the case on the merits if you like, but not for the sake of making a technical objection.

(The case was then proceeded with on the merits (which were unimportant), and was ultimately adjourned for the production of further evidence.)

Solicitors: *Druces, Son & Co.* for the creditor.

Gregg, Meikle & Briggs for the trustee.



DIVISIONAL
COURT.

BEFORE
MATHEW, J.,
AND CAVE, J.
1884.

December 4.

IN RE BLENKHORN, EX PARTE BLEASE & BLEASE.

*Bankruptcy Rules, 1883, Rule 112 and Rule 114—Preliminary Objection—
Appeal out of Time—Costs.*

THIS was an appeal from an order of the learned judge of the Manchester County Court dismissing a bankruptcy petition.

C. A. Russell for the appellants.

Smyly for the respondent.

Smyly :

I have a preliminary objection. The appeal is out of time. The order appealed from was made on October 27th last; the appeal was not entered until November 20th. That is twenty-four days.

C. A. Russell :

I cannot dispute the fact. It is a mere matter of arithmetic. But if the objection is held fatal, I submit that the appeal may be dismissed without costs. The respondent has given no notice to the appellants that he intended to raise this preliminary objection. In the case of *In re Speight, Ex parte Brooke* (L. R., 13 Q. B. D. 42; and see also *ante*, at p. 91), it was held, that "when the respondent to an appeal intended to take a preliminary objection, he should give notice to the appellant at the earliest possible moment of his intention so to do, and of the nature of the objection, in order that the appellant might know that if he went on with his appeal he did so at the peril of costs."

MATHEW, J. :

The appeal must be dismissed, but without costs.

CAVE, J., concurred.

Solicitors : *Carter & Church* for the appellants.

Pritchard, Englefield & Co. for the respondent.



PRACTICE.**IN RE HASTINGS, EX PARTE DEARLE.**

Bankruptcy Act, 1883, Section 4, Sub-section 1 (g); and Sections 5, 6, and 105, Sub-section (3)—Bankruptcy Notice—Mere Trustee—Joining Beneficial Owner of Debt.

Held: (1) That under the Bankruptcy Act, 1883, the old rule in bankruptcy still remains in force, that where a debt is vested in a mere trustee for an absolute beneficial owner, who is capable of dealing with the debt as he pleases, the trustee cannot alone present a bankruptcy petition against the debtor, but the beneficial owner must join in the petition. *Ex parte Culley, In re Adams* (L. R., 9 Ch. Div. 307), confirmed.

(2) That where by failing to comply with the terms of a bankruptcy notice a debtor has committed an act of bankruptcy under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, any creditor may avail himself of such act of bankruptcy for the purpose of presenting a petition, and the right to present a petition is not limited to that creditor by whom the bankruptcy notice has been served.

**COURT OF
APPEAL.**

**BEFORE
THE LORD
CHIEF JUSTICE,
THE MASTER OF
THE ROLLS
AND LORD
JUSTICE
LINDLEY.**

1884.

December 5.

THIS was an appeal from a decision of Mr. Registrar *Brougham* dismissing a bankruptcy petition presented by *J. G. Dearle* against the debtor *A. G. Hastings*, upon the ground laid down in the case of *Ex parte Culley, In re Adams* (L. R., 9 Ch. Div. 307), "that where a debt is vested in a mere trustee for an absolute beneficial owner who is capable of dealing with the debt as he pleases, the trustee cannot alone sustain a petition for adjudication of bankruptcy against the debtor, but the beneficial owner must join in the petition."

In the year 1883, the sum of 1,200*l.* belonging to one *Ada Dearle*, a sister of *J. G. Dearle*, was advanced through him to Messrs. *Fulton & Carr*, solicitors, for whom he was at that time acting as managing clerk. The debt was not repaid, and in February, 1884, an assignment was made by *Fulton & Carr* to *J. G. Dearle*, of the debts of the firm to secure the money. Under that deed, however, *J. G. Dearle* received only about 250*l.*, and on May 21st, 1884, *A. G. Hastings*, the present debtor, who was also a solicitor, became guarantor of the sum then due.

On June 29th, 1884, an action was commenced by *J. G. Dearle*

1884.
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 IN RE  
 HASTINGS,  
 EX PARTE  
 DEARLE.

against *Hastings* for the debt, and on August 4th judgment was signed against him under Order XIV.

A bankruptcy notice was duly served, with the terms of which the debtor failed to comply, and a petition was accordingly presented by *J. G. Dearle* against him on August 16th, but in consequence of negotiations between the parties for an amicable settlement such petition was held over until October.

On October 20th, however, the petition came on for hearing before Mr. Registrar *Brougham*, and was then dismissed by him on the ground above stated, that the cestui que trust ought to have been joined.

From this decision *J. G. Dearle* now appealed, and asked that such order might be set aside or varied, or that a receiving order might be made.

Sub-section 1 (g) of section 4 of the Bankruptcy Act, 1883, provides that a debtor commits an act of bankruptcy "If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

And by section 5, "Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate."

And by section 6, "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless"—[then follow the conditions on which a creditor may present a petition].

*E. Clarke, Q.C. (Wallace with him), for the appellant.*

The judgment is conclusive evidence of the petitioning creditor's debt. The Court cannot go behind the judgment. No notice by the debtor of his intention to show cause against the petition under Rule 137 was filed. An examination of the terms of sections 4, 5 and 6 of the Bankruptcy Act, 1883, show clearly that Mr. *Dearle* only could petition, and no one else should be joined.

[LINDLEY, L. J.: The old rule was against a trustee taking advantage of the act of bankruptcy.]

Sub-section 1 (g) of section 4 says, if "*a creditor*" has obtained final judgment. The only creditor who has obtained judgment is Mr. *Dearle*. Then look at the terms of section 5. The application for a receiving order by a creditor is, on this act of bankruptcy, by the creditor who could take steps under sub-section 1 (g) of section 4. Mr. *Dearle* is the person to petition. Then in section 6 "*a creditor*" shall not be entitled to present a petition unless, &c. Who is the creditor? Clearly Mr. *Dearle* is the judgment creditor. He served the bankruptcy notice, and he alone can take the necessary steps to present a petition.

[THE MASTER OF THE ROLLS: On the mere words of the Act *prima facie* you are right. Now is there anything in this new Act to alter the old rule of law?]

I am bound to find in the Act of 1883 the person who is to take advantage of this act of bankruptcy. I submit that I have done so in the sections I have quoted. It is a creditor who has obtained judgment. In this case that is Mr. *Dearle*. If Mr. *Dearle* had presented the petition on behalf of himself and *Ada Dearle*, the objection would have been raised that such petition was being presented by a person who was not entitled.

[THE MASTER OF THE ROLLS: The *cestui que trust* cannot be the petitioning creditor. The rule in bankruptcy was that the trustee alone could not. What objection is there to both?]

*Ex parte Culley, In re Adams*, is clear in its decision, but under a new Act that decision does not apply.

1884.

IN RE  
HASTINGS,  
EX PARTE  
DEARLE.

1884.  
 IN RE  
 HASTINGS,  
 EX PARTE  
 DEARLE.

[THE MASTER OF THE ROLLS: Is it inconsistent with the Act that the cestui que trust should be joined?]

It is inconsistent; the bankruptcy notice must be by the creditor who has obtained judgment. Then, by section 5, that creditor must present the petition.

[THE MASTER OF THE ROLLS: There is this difficulty. Supposing the judgment is obtained by the trustee and the judgment debtor pays the cestui que trust. Could the trustee go on?]

*Wallace* followed:

I wish merely to speak as to the question of amendment. I would call your Lordships' attention to sub-section (3) of section 105 of the Act, which provides that "the Court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it may think fit to impose." I submit that this is a case in which the Court would exercise that power.

*E. Cooper Willis, Q.C. (E. J. Davis with him),* for the respondent.

[THE LORD CHIEF JUSTICE: As to the first point, Mr. *Willis*, I think I may say we are with you. Have you anything to say on the question of amendment?]

*E. Cooper Willis, Q.C.:*

No notice has been given that the appellant intended to ask for this. It is outside the appeal. If there had simply been a lapse in not adding *Ada Dearle* it might be amended, but Mr. *Dearle* is solely a trustee.

[THE MASTER OF THE ROLLS: If the petition is amended would the position of the debtor be materially altered?]

I have good reason to know that *Ada Dearle* does not wish to be added.

[THE MASTER OF THE ROLLS: Suggest a reason.]

She is friendly to the debtor, and she has security. Further, the petition is more than three months old. The amending would

be analogous to making a petition on an act of bankruptcy more than three months old. The Court will not amend after time.

1884.

IN RE  
HASTINGS,  
EX PARTE  
DEARLE.

THE LORD CHIEF JUSTICE (COLERIDGE) :

On the first point I am of opinion that this appeal must be dismissed. I am of opinion that the decision of the Registrar was right. The general rule was, and that rule is apparently continued by the Bankruptcy Act, 1883, that a mere trustee could not be a petitioning creditor without joining the cestui que trust, if the latter is capable of dealing with the debt. There was good reason for that practice. The trustee might make a man a bankrupt on a debt to which the cestui que trust had no real right at all, and to which the man as against the cestui que trust had a good defence. The Bankruptcy Act of 1869 decided that the non-payment of an equitable debt was an act of bankruptcy. Upon that state of things, the Judicature Act having been passed in the year 1873, it was contended that by the Bankruptcy Act of 1869, and by the Judicature Act, 1873, which ordained the administration of law and equity concurrently, the old rule of practice had been abrogated. But in the year 1878, in the case of *Ex parte Culley*, *In re Adams*, an express decision was given on the Bankruptcy Act, 1869, and the Judicature Act, 1873, by the Court of Appeal, and that Court was clearly of opinion that the old law was to be maintained. That was in 1878; but the Bankruptcy Act of 1883 is now passed, and in the present case the trustee of a debt is the sole petitioning creditor in these bankruptcy proceedings; the cestui que trust, in whose benefit the petition was presented, is his sister, and it has been suggested that the old rule is now set aside. The grounds put forward in support of that argument are that amongst a variety of acts of bankruptcy, sub-section (1) (g) of section 4 of the Bankruptcy Act, 1883, provides—[*his Lordship read the sub-section*]. In this case the trustee signed final judgment under Order XIV., and the terms of the bankruptcy notice not being complied with, an act of bankruptcy was committed. Then comes the question, who is to take advantage of it? The appellant says the person who has obtained final judgment. The words of sub-section (1) (g) of section 4, "If a creditor has obtained final judgment, &c., and has served, &c," and the words of section 5,

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 DEARLE.

"on a bankruptcy petition being presented either by a creditor, &c.," show, it has been urged, that "a creditor" in section 5 means the same creditor who has obtained judgment, and that one only. Now, in my opinion, that does not follow. Another creditor, upon the act of bankruptcy created, if I may so term it, by the former creditor, may present the petition. There is nothing to show that it is "the" creditor who has obtained the judgment. Unless some words can be found to take away the old practice, the old practice must remain, that the cestui que trust must be joined in the petition. All the arguments which were urged in 1878 have been addressed to us to-day, and I must say they have been addressed in vain; the appeal must therefore be dismissed. Then as to the question of amendment. Under sub-section (3) of section 105, we have clearly power to allow an amendment, and having the power, ought we to exercise it? I think so, clearly. A slip or mistake has been made, and it is now proposed to amend it. By doing so we shall not alter the position of any party. *Ada Dearle* will be added, and the petition will go on for her benefit. Then the question arises, on what terms? On the whole, I think that those who make the mistake must pay for it. A week will be given to make the amendment on the consent of *Ada Dearle* being obtained, and the appellants must pay the cost of the appeal and the costs of the amendment.

#### THE MASTER OF THE ROLLS (BRETT) :

The only question here is whether the petitioning creditor, as described in the petition, was a proper one. Before the year 1869 there was this rule in bankruptcy, and it had become the established rule, that a bare trustee could not be the petitioning creditor without joining the cestui que trust. The reason for the rule remained over after the Bankruptcy Act, 1869, and the reason remains over after the Bankruptcy Act, 1883, as it did before. The new Act has not said one word either to affirm or negative who shall be the petitioning creditor. There is moreover this stronger fact that the new Act was passed after the decision of *Ex parte Culley*, *In re Adams*, and if the legislature wished to alter it, it might have done so. The argument has been put forward that the creditor in section 5 must be the same creditor as that men-

tioned in section 4, sub-section 1 (g). It does not follow. Any creditor can petition on the act of bankruptcy. With regard to the question of amendment I entirely agree with what the Lord Chief Justice has said.

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LINDLEY, L. J. :

The rule has been inflexible for something like the last 100 years that the trustee must join the cestui que trust in the petition. The reason was the protection of the bankrupt. The point was considered and confirmed in *Ex parte Culley, In re Adams*, and I am of opinion that the rule still remains. I am also of opinion that any creditor may petition after the act of bankruptcy. If after the act of bankruptcy in this case another creditor had presented a petition, would the old rule have applied? Certainly it would. I think that the decision of the Registrar was right, but that we ought to give leave to amend, the appellant paying the costs.

Solicitors : *J. G. Dearle* for the appellant.

*Ben Davis* for the respondent.



# IN RE PAGE, EX PARTE THE TRUSTEE.

*Bankruptcy Act, 1883, Section 55, Sub-section (4)—Disclaimer—Personal Liability of Trustee for Rent.*

BEFORE  
MR. JUSTICE  
CAVE.  
1884.

December 15.

Where notice had been served on the trustee requiring him to decide whether he would disclaim or not within twenty-eight days, in accordance with the terms of section 55, sub-section (4), of the Bankruptcy Act, 1883, and the trustee did not within that time signify his intention as required, leave to disclaim given only on condition of payment of a month's rent to the landlord, such rent, together with the costs of the landlord, to be paid by the trustee personally.

**T**HIS was an application on behalf of the trustee in the bankruptcy for leave to disclaim the lease of certain premises situate at 263, Pentonville Road.

Section 55, sub-section (4), of the Bankruptcy Act, 1883, provides that "The trustee shall not be entitled to disclaim any

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property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it."

*F. C. Willis*, for the trustee, asked leave to disclaim.

*Herbert Reed* for the landlord :

The trustee was appointed on October 11th. On November 5th notice was served on him by us requiring him to decide whether he would disclaim or not. The trustee, however, never communicated with the landlord, and he never disclaimed. The twenty-eight days allotted by section 55, sub-section (4), expired on December 3rd. Notice of motion was not even given until December 6th. Under these circumstances I submit that if the trustee now applies for an extension of time for leave to disclaim it ought only to be upon terms. I submit that he should, at any rate, be directed to pay rent from the expiration of the twenty-eight days.

CAVE, J.:

Judgment.

The trustee may have leave to disclaim within a week, on payment of a month's rent.

*F. C. Willis* :

I presume the rent will be paid out of the estate?

CAVE, J.:

No. The trustee has been altogether negligent, and must pay the month's rent, and also the costs of the landlord, personally, and not out of the estate.

Solicitors : *Jackson & Evans* for the trustee.

*Yeo & Co.* for the landlord.

## DIGEST OF CASES REPORTED IN THIS VOLUME.



ACT OF BANKRUPTCY.]—(1) *Held*: 1. That where a debtor had committed an act of bankruptcy under the Bankruptcy Act, 1869, and no proceedings in bankruptcy had been taken against him prior to January 1st, 1884, when the Bankruptcy Act, 1883, came into operation, proceedings in bankruptcy under the Bankruptcy Act, 1883, might be taken against such debtor founded on the act of bankruptcy previously committed. 2. That where proceedings in liquidation were pending on January 1st, 1884, which afterwards came to an end, proceedings to obtain an adjudication against a debtor founded on the act of bankruptcy committed by him by filing the liquidation petition might be taken under the Bankruptcy Act, 1883. *In re Pratt, Ex parte Pratt* . . . p. 27

(2) A notice given by a debtor under sect. 4, sub-s. 1 (h), that he has suspended, or that he is about to suspend, payment of his debts, need not, in order to constitute an act of bankruptcy, be necessarily given in writing. *In re Walker & Son, Ex parte Nickoll & Knight* . . . p. 188

Compare also *In re Friedlander, Ex parte Oastler & Co.* . . . p. 207

(3) *Held*: 1. That where a verbal statement was made by a debtor to one of his creditors that he was unable to pay his debts in full, such statement did not amount to a notice by the debtor "that he has suspended, or that he is about to suspend, payment of his debts," so as to constitute an act of bankruptcy under sect. 4, sub-s. 1 (h), of the Bankruptcy Act, 1883. 2. That although such notice need not, in order to constitute an act of bankruptcy, be necessarily given in writing, still if it is given verbally it must be a formal notice, and given with the intention of giving such notice. *In re Friedlander, Ex parte Oastler & Co.* p. 207

Compare also *In re Walker & Son, Ex parte Nickoll & Knight* . . . p. 188

(4) *Held*: That where a deed of assignment of the whole of their property executed by the debtors for the benefit of their creditors generally contained a provision for the payment out of the assets in the first instance of the costs and expenses of the trustee under the said deed of assignment, such trustee was not entitled (on the debtors being adjudged bankrupt upon a petition founded on the deed as an act of bankruptcy) to retain as against the trustee in the bankruptcy assets in his hands, on the ground that a sum exceeding the said assets was due to him for work and labour done. *In re J. and H. Richards, Ex parte The Official Receiver* . . . p. 242

(5) *Held*: 1. That where a debtor has assigned the whole of his property to a trustee for the benefit of his creditors generally, and such trustee has taken possession of the property and carried on the debtor's business, in the event of the debtor subsequently being adjudged bankrupt on a petition founded on the act of bankruptcy committed by the execution of the deed of assignment, the trustee in the bankruptcy must elect to treat the trustee under the deed either



as his agent or as a trespasser. 2. If the trustee in the bankruptcy elects to treat the trustee under the deed as a trespasser, he can only claim from him any property of the bankrupt which remains in his possession unconverted, and the value, at the time when he took possession, of any property which he has taken possession of and has converted. *In re Riddeough, Ex parte Vaughan* . p. 258

(6) *Held*: That where a bankruptcy petition is presented by a creditor founded on an act of bankruptcy committed by the failure of the debtor to comply with the terms of a bankruptcy notice to pay a judgment debt, and an appeal is pending from such judgment, it is a matter of discretion for the Registrar whether he will make a receiving order, or stay the proceedings, and the Court of Appeal will not interfere unless such exercise of discretion is clearly wrong. *In re Rhodes, Ex parte Heyworth* . . . . . p. 269

(7) *Held*: That where by failing to comply with the terms of a bankruptcy notice a debtor has committed an act of bankruptcy under sect. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, any creditor may avail himself of such act of bankruptcy for the purpose of presenting a petition, and the right to present a petition is not limited to that creditor by whom the bankruptcy notice has been served. *In re Hastings, Ex parte Dearle* . . . . . p. 281

APPEAL.]—(1) *Held*: That by reason of the provisions of sects. 103 and 104 of the Bankruptcy Act, 1883, an appeal from an order of the judge to whom bankruptcy business is assigned upon an application under sect. 5 of the Debtors Act, 1869, will now lie directly to the Court of Appeal, and not as formerly to a Divisional Court. *In re Lascelles, Ex parte Genese* . . . . . p. 183

(2) *Held*: That an application for leave to appeal under sect. 2 of the Bankruptcy Appeals (County Court) Act, 1884, from the decision of a Divisional Court, sitting as a Court of Appeal, from a County Court in bankruptcy, should be made in the first instance to a Divisional Court.

That such application for leave to appeal ought to be made to the Divisional Court immediately after such Divisional Court has pronounced its decision. *In re Walker & Son, Ex parte Nickoll & Knight* . . . . . p. 249

(3) *Held*: That where a bankruptcy petition is presented by a creditor founded on an act of bankruptcy committed by the failure of the debtor to comply with the terms of a bankruptcy notice to pay a judgment debt, and an appeal is pending from such judgment, it is a matter of discretion for the registrar whether he will make a receiving order or stay the proceedings, and the Court of Appeal will not interfere unless such exercise of discretion is clearly wrong. *In re Rhodes, Ex parte Heyworth* . . . . . p. 269

(4) *Held*: That where the trustee rejects a proof tendered by a creditor, and from such rejection an appeal is brought, it is not sufficient to apply to the Court within the twenty-one days limited by Rule 174 of the Bankruptcy Rules, 1883, to fix a day and time for the hearing of the appeal, but notice of motion in the usual way must be served on the trustee within the twenty-one days. *In re Gillespie & Co., Ex parte Morrison & Aitchison* . . . . . p. 278

(5) Appeal out of time.

*In re Courtenay, Ex parte Dear* . . . . . p. 89

*In re Blenkhorn, Ex parte Blease* . . . . . p. 280

ARRANGEMENT.]—See *Scheme of Arrangement*.

ASSIGNMENT—*Of Book Debts*.]—An assignment of the book debts will carry the books, so that the person entitled to the book debts under the deed is entitled to the books of account; and Rule 259 was intended to apply only to a case where a person not entitled to the debts sets up some claim to the books. *In re White & Co., Ex parte The Official Receiver* . . . . . p. 77

*Of Lease, Goodwill, Stock, &c.*]—The debtor, who carried on business at two different premises, within a few days of filing his petition, executed an assignment handing over his interest in the lease, goodwill and stock of one of the said premises to a judgment creditor who was threatening to levy execution, such assignment to be in full satisfaction of the whole judgment debt, and the judgment creditor was to redeem the lease of the property, which had been deposited on mortgage with a loan society, and to pay rent due, &c.

*Held*: That there was no proof that the motive of the debtor was to prefer the creditor; that at the time of the assignment the judgment creditor could seize and have his debt paid out of the goods at both the places of business of the debtor; that the effect of the assignment was to relieve the debtor of liability at one place of business, and could not be deemed to be a fraudulent preference. *In re W. H. Wilkinson, Ex parte The Official Receiver* . . . . . p. 65

*Of Property to Trustee for Benefit of Creditors generally*.]—(1) *Held*: That the fact that a large majority in number and value of the creditors of a debtor have assented to a deed assigning to trustees all the debtor's property for the benefit of his creditors generally, is not a "sufficient cause" within the meaning of sect. 7, sub-s. (3), of the Bankruptcy Act, 1883, for dismissing a petition for a receiving order against the debtor presented by a dissenting creditor even for a small amount; such receiving order being founded on the act of bankruptcy committed by the execution of the deed.

It is the intention of the legislature that proposals for a composition or scheme of arrangement shall only be entertained after a receiving order has been made.

That an official receiver ought not to appear at the hearing of an appeal from a receiving order, unless it is necessary for him to do so for the purpose of bringing some special circumstance to the notice of the Court; and this special circumstance the Court will take into consideration when the costs are applied for. *In re Dixon & Wilson, Ex parte Dixon & Wilson* . . . . . p. 98

(2) *Held*: That where a deed of assignment of the whole of their property executed by the debtors for the benefit of their creditors generally contained a proviso for the payment out of the assets in the first instance of the costs and expenses of the trustee under the said deed of assignment, such trustee was not entitled (on the debtors being adjudged bankrupt upon a petition founded on the deed as an act of bankruptcy) to retain as against the trustee in the bankruptcy assets in his hands, on the ground that a sum exceeding the said assets was due to him for work and labour done. *In re J. & H. Richards, Ex parte The Official Receiver* . . . . . p. 242

(3) *Held*: That where a debtor has assigned the whole of his property to a trustee for the benefit of his creditors generally, and such trustee has taken possession of the property and carried on the debtor's business, in the event of

the debtor subsequently being adjudged bankrupt on a petition founded on the act of bankruptcy committed by the execution of the deed of assignment, the trustee in the bankruptcy must elect to treat the trustee under the deed either as his agent or as a trespasser.

If the trustee in the bankruptcy elects to treat the trustee under the deed as a trespasser, he can only claim from him any property of the bankrupt which remains in his possession unconverted, and the value, at the time when he took possession, of any property which he has taken possession of and has converted. *In re Riddeough, Ex parte Vaughan* . . . . . p. 258

ATTORNEY.]—*Held*: That a bankruptcy petition presented by a creditor may be signed on behalf of such creditor by his duly constituted attorney. *In re Wallace, Ex parte Wallace* . . . . . p. 246

BALANCE ORDER.]—*Held*: That a "balance order" made in the voluntary winding-up of a company, whereby a contributory was ordered to pay in to the liquidator certain calls made in respect of the said company before the commencement of the winding-up, is not a "final judgment" within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to support a bankruptcy notice. *In re Sanders, Ex parte Whinney* . . . . . p. 185

BANKRUPTCY NOTICE.]—(1) A garnishee order absolute is not a "final judgment" against the garnishee within the meaning of section 4, sub-section 1 (g), so as to make the failure to comply with a bankruptcy notice founded upon it an act of bankruptcy on the part of the garnishee. *Ex parte Chinery, In re Chinery* . . . . . p. 31

(2) *Held*: That where a bill has been given by a debtor, upon whom a bankruptcy notice has been served, for the amount of the judgment debt, and has been taken by the creditor, such bill is sufficient satisfaction of the requirements of the bankruptcy notice under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to prevent such creditor afterwards proceeding to obtain a petition against the debtor on the bankruptcy notice. *In re Matthew, Ex parte Matthew* . . . . . p. 47

(3) *Held*: That the fact that an order has been made against a defendant requiring him to pay the taxed costs in an action within a specified time, does not constitute such order a "final judgment" within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to entitle the plaintiff, in the event of the defendant failing to comply with the terms of the order, to obtain a bankruptcy notice against the defendant founded on the order. *In re Cohen, Ex parte Schmitz* . . . . . p. 55

(4) Irregularity of bankruptcy notice and petition—Bankruptcy petition in name of partners—Bankruptcy of one partner between service and hearing of petition—Amendment. *In re Owen, Ex parte Owen* . . . . . p. 93

(5) *Held*: That a "balance order" made in the voluntary winding-up of a company, whereby a contributory was ordered to pay in to the liquidator certain calls made in respect of the said company before the commencement of

the winding-up, is not a "final judgment" within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to support a bankruptcy notice. *In re Sanders, Ex parte Whinney* . . . . . p. 185

(6) *Held*: That a creditor in order to serve a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, must be entitled and in a position to issue execution: and that in consequence a bankruptcy notice against a judgment debtor cannot be issued by the executor of a creditor who has obtained final judgment, unless such executor has first obtained leave from the Court to issue execution on the judgment under Rule 23 of Order XLII. of the Rules of the Supreme Court, 1883. *In re Woodall, Ex parte Woodall* . p. 201

(7) *Held*: That where a bankruptcy petition is presented by a creditor founded on an act of bankruptcy committed by the failure of the debtor to comply with the terms of a bankruptcy notice to pay a judgment debt, and an appeal is pending from such judgment, it is a matter of discretion for the registrar whether he will make a receiving order or stay the proceedings; and the Court of Appeal will not interfere unless such exercise of discretion is clearly wrong. *In re Rhodes, Ex parte Heyworth* . . . . . p. 269

(8) *Held*: That where, by failing to comply with the terms of a bankruptcy notice, a debtor has committed an act of bankruptcy under section 4, sub-section 1 (g), any creditor may avail himself of such act of bankruptcy for the purpose of presenting a petition, and the right to present a petition is not limited to that creditor by whom the bankruptcy notice has been served. *In re Hastings, Ex parte Dearle* . . . . . p. 281

BILL OF EXCHANGE.]—*Held*: That where a bill has been given by a debtor, upon whom a bankruptcy notice has been served, for the amount of the judgment debt, and has been taken by the creditor, such bill is sufficient satisfaction of the requirements of the bankruptcy notice under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to prevent such creditor afterwards proceeding to obtain a petition against the debtor on the bankruptcy notice. *In re Matthew, Ex parte Matthew* . . . . . p. 47

BILL OF SALE.]—*Held*: That an injunction restraining a person, not a party to the bankruptcy proceedings, from dealing with property of the debtor claimed under a bill of sale, the validity of which is disputed, ought not to be granted without requiring an undertaking to be given for damages by the person obtaining the order. *In re F. H. Johnstone, Ex parte Abraham* . p. 32

BOARD OF TRADE.]—See *Committal*; *Trustee*; *Review of Taxation*, &c.

BOOK DEBTS.]—*Held*: That an assignment of the book debts will carry the books, so that the person entitled to the book debts under the deed is entitled to the books of account; and that Rule 259 of the Bankruptcy Rules, 1883, was intended to apply only to a case where a person not entitled to the debts sets up some claim to the books. *In re White & Co., Ex parte The Official Receiver* . p. 77

CHANCERY DIVISION—*Stay of Proceedings in.*]—*Held*: 1. That when receivers, appointed in an action for dissolution of partnership, are discharged

by order of the judge in bankruptcy, their office is to determine from the date of the order by which they are discharged.

2. That the remuneration of such receivers shall be assessed by the registrar.

*In re Parker & Parker, Ex parte The Official Receiver* . . . . . p. 39

*Transfer of Action pending in.*—(1) *Held*: That when application is made under section 102, sub-section 4, of the Bankruptcy Act, 1883, for the transfer of an action pending in another Division of the High Court, some proof must be afforded that advantage is likely to be derived by reason of such transfer to the judge in bankruptcy. *Quære*, Whether in a case where a receiving order has been made, but the debtor has not been adjudicated a bankrupt, the Court has any jurisdiction under section 102, sub-section 4, of the Bankruptcy Act, 1883, to make an order to transfer. *In re White & Co., Ex parte The Official Receiver* . . . . . p. 77

(2) *Held*: 1. That where an order has been made under sub-section 4 of section 125 of the Bankruptcy Act, 1883, transferring proceedings for the administration of a deceased debtor's estate from the Chancery Division of the High Court to the Court exercising jurisdiction in bankruptcy, the latter Court may make an administration order on an *ex parte* application by a creditor. 2. But such order cannot be made until the expiration of two months from the date of the grant of probate or of letters of administration, unless either the legal personal representative of the deceased debtor consents thereto, or unless such debtor has committed an act of bankruptcy within three months prior to his decease. *In re J. A. May, Ex parte E. May* . . . . . p. 232

COMMITTAL.]—(1) Bankruptcy Act, 1883, section 102; Bankruptcy Rules, Nos. 20, 22, 23, 26 and 49—Motion to commit—Affidavit of service not mentioned in notice of motion. *In re J. Pearce, Ex parte The Board of Trade* . . . . . p. 111

(2) Bankruptcy Rules, 1883, Rule 78—Application for substituted service of notice of motion to commit. *In re J. Pearce, Ex parte The Board of Trade* . p. 135

(3) Committal—Undertaking to prove means—Office copy judgment—Affidavit in denial of satisfaction—County Court Rules, 1875, Order XIX. Rule 9—Exclusive or concurrent jurisdiction of County Court. *In re Stone, Ex parte Nicholson, In re Philby; Ex parte Nicholson* . . . . . p. 177

COMPOSITION.]—See *Scheme of Arrangement*.

(1) A Court to whom application is made to approve a composition accepted by the creditors of a debtor under section 18 of the Bankruptcy Act, 1883, must exercise its own discretion in determining whether such composition is reasonable and calculated to benefit the general body of creditors, and if such Court is not satisfied with all the circumstances attending the debtor's conduct and the acceptance of the composition, it is its duty to refuse its approval.

In a case where a debtor within the space of about eighteen months had allowed a debt due to him from a person whom he knew to be in pecuniary difficulties to increase from 32,000*l.* to more than 60,000*l.*, and it appeared that to the amount of 11,000*l.* this increase was due to accommodation bills,

and such debtor subsequently stopped payment and presented a bankruptcy petition, and a composition was accepted by the creditors—

*Held:* That the debtor had been guilty of rash and hazardous speculations, and that, even if the composition were reasonable, the Court ought to refuse its approval. *In re Rogers, Ex parte Rogers* . . . . . p. 159

(2) *Held:* That where, before a composition is approved by the Court, the business of the debtor is carried on by the official receiver, who makes payments out of his own pocket, and incurs personal liability for the purpose of carrying on such business, the proper order for the Court to make on approving the composition is, that the official receiver shall forthwith deliver up possession of the debtor's estate to the trustee under the composition, and that such trustee shall pay to the official receiver what may be found due to him out of the first assets which come into his hands. *In re Taylor, Ex parte The Board of Trade*. p. 264

**COSTS—Of Trustee on Sale of Mortgaged Property.]—***Held:* That the provisions of Rules 78 to 81 of the Bankruptcy Rules, 1870 (*compare Nos. 65 to 69 of the Bankruptcy Rules, 1883*), were not intended to fetter the Court in cases where an application has been made to the Court by a mortgagee of property of the bankrupt for a sale of such property as provided by the rules, so as (1) to compel the Court to give the conduct of such sale to the trustee in the bankruptcy: or (2) to compel the Court to give the trustee a first charge on the proceeds of the sale for his costs and expenses in cases where the conduct of the sale has been taken away from him. *In re Jordan, Ex parte Lloyd's Banking Company* p. 41

*Of Execution.]—Held:* That the meaning to be attached to the words "costs of the execution" in sub-section 1 of section 46 of the Bankruptcy Act, 1883, is different to the meaning to be attached to the same words in sub-section 2 of the same section. Under the words "costs of the execution" in sub-section 1 the sheriff is not entitled to "poundage." *In re W. and J. Ludford* . . p. 131

*Of Public Examination.]—Held:* 1. That the words "any proceeding in Court" in section 105, sub-section 1, of the Bankruptcy Act, 1883, do not include a second meeting of the creditors under a bankruptcy petition, summoned for the purpose of confirming a scheme of arrangement of the debtor's affairs accepted at the first meeting.

2. That the Court has in consequence no power to order the costs of the petitioner incidental to such second meeting to be paid out of the debtor's estate.

3. But the words do include the public examination of the debtor, and the Court has power to order costs incidental to such public examination to be paid out of the estate. *In re Strand, Ex parte The Board of Trade and The Official Receiver* . . . . . p. 196

*Of Solicitor.]—(1) Held:* That where, after the presentation of the bankruptcy petition, proceedings are carried on by a debtor, from which the official receiver comes to a clear conclusion that substantial advantage has accrued to the debtor's estate, such ought to be looked upon in the light of salvage, and the costs attendant upon the proceedings in question should be allowed out of the estate. *In re F. H. Johnstone, Ex parte Angier* . . . . . p. 213

(2) *Held*: That an application by the Board of Trade for a review of taxation of the costs of a solicitor under Rule 104 of the Bankruptcy Rules, 1883, can only be made for the benefit of the estate; and where there is no estate and no trustee such rule will not apply. *In re Rodway, Ex parte Phillips* . p. 228

*Of Trustee under Deed of Assignment.*—*Held*: That where a deed of assignment of the whole of their property executed by the debtors for the benefit of their creditors generally contained a provision for the payment out of the assets in the first instance of the costs and expenses of the trustee under the said deed of assignment, such trustee was not entitled (on the debtors being adjudged bankrupt upon a petition founded on the deed as an act of bankruptcy) to retain as against the trustee in the bankruptcy assets in his hands, on the ground that a sum exceeding the said assets was due to him for work and labour done. *In re J. and H. Richards, Ex parte The Official Receiver* . . . p. 242

*Of Shorthand Writer's Notes.*—See *In re Day, Ex parte The Trustee* . p. 251

*Personal Liability of Trustee for.*—Where notice had been served on the trustee requiring him to decide whether he would disclaim or not within twenty-eight days in accordance with the terms of section 55, sub-section 4, of the Bankruptcy Act, 1883, and the trustee did not within that time signify his intention as required, leave to disclaim given only on condition of payment of a month's rent to the landlord, such rent, together with the costs of the landlord, to be paid by the trustee personally. *In re Page, Ex parte The Trustee* . p. 287

*When Appeal out of Time.*—See *In re Blenkhorn, Ex parte Blease and Blease*. p. 280

DEBTORS ACT, 1869.]—*Held*: That by reason of the provisions of sections 103 and 104 of the Bankruptcy Act, 1883, an appeal from an order of the judge to whom bankruptcy business is assigned upon an application under section 5 of the Debtors Act, 1869, will now lie directly to the Court of Appeal, and not as formerly to a Divisional Court. *In re Lascelles, Ex parte Genese* . . p. 183

DELEGATION OF JUDGE'S AUTHORITY.]—See *Registrar*.

DISCHARGE OF DEBTOR.]—(1) In a case where a scheme of arrangement of the debtor's affairs, duly agreed to and confirmed by the creditors in accordance with the provision of section 18 of the Bankruptcy Act, 1883, contained a clause to the effect that "the debtors shall be discharged when the committee of inspection so resolve"—

*Held*: That such provision dealing with the discharge of the debtors was unreasonable, and not in accordance with the intention and scope of the Act; and that a scheme containing such a provision ought not to be approved by the Court, even though the debtors themselves asked that such approval should be given. *In re Clarke, Ex parte Clarke* . . . p. 143

(2) *Held*: That the fact that a bankrupt has brought an unsuccessful action, the costs of which he is unable to pay, is not sufficient cause to justify the Court in refusing his discharge on the ground that under sub-section 3(c) of section 28 of the Bankruptcy Act, 1883, such bankrupt has contracted a

debt without having any reasonable ground of expectation of being able to pay it. *In re J. Williams* . . . . . p. 91

DISCLAIMER.]—(1) *Held*: That where application for leave to disclaim is made by a trustee in a bankruptcy, a demand of the landlord for rent in respect of the premises sought to be disclaimed will not be entertained by the Court unless such landlord has been kept out of his property for the benefit of the creditors, and the creditors have obtained some advantage therefrom. *In re Zappert & Co., Ex parte The Trustee* . . . . . p. 72

(2) *Held*: That in cases where a trustee in a bankruptcy seeks to disclaim, if subsequent to the adjudication any advantage has been derived from the use of the landlord's property, that is the use of the creditors and not of the debtor, and for this advantage the landlord is entitled to be paid. *In re T. Brooke, Ex parte The Trustee*. . . . . p. 82

(3) *Application* by trustee for extension of time in which to disclaim, the application being made after the time allowed by the Act for disclaiming had expired. *In re G. Price* . . . . . p. 153

(4) *Held*: That where a trustee seeks to disclaim a lease under section 53 of the Bankruptcy Act, 1883, the Court may, if it thinks fit, under sub-section 3 of section 55 permit such trustee to remove fixtures. *In re Moser, Ex parte The Trustee*. . . . . p. 244

(5) *Quære*: Whether the words of sub-section 6 of section 55 of the Bankruptcy Act, 1883, are intended to apply to a landlord. *In re Parker & Parker, Ex parte Turquand* . . . . . p. 275

(6) Where notice had been served on the trustee requiring him to decide whether he would disclaim or not within twenty-eight days in accordance with the terms of section 55, sub-section 4, and the trustee did not within that time signify his intention as required, leave to disclaim given only on condition of payment of a month's rent to the landlord, such rent, together with the costs of the landlord, to be paid by the trustee personally. *In re Page, Ex parte The Trustee* . . . . . p. 287

DIVIDENDS, UNDISTRIBUTED.]—*Application* on behalf of the Board of Trade for an order directing trustees to pay certain undistributed funds and dividends into the Bank of England. *In re James Pearce, Ex parte The Board of Trade* . . . . . p. 56

DIVISIONAL COURT.]—See *Appeal*.

DOMICIL.]—*Held*: 1. That section 6, sub-section 1 (d), of the Bankruptcy Act, 1883, which provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor, unless such "debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England," must be taken to mean domiciled in England as distinguished from Scotland or Ireland.

2. That the onus of proof of the domicil is, in the first instance, on the creditor presenting the petition.



3. That it is not sufficient, in order to throw the onus of proof on the other side, for the petitioning creditor to show that the debtor is an officer in the British army on active service out of England, and belongs to a regiment, the head-quarters of which are in England, and bears an English name.

4. A Scotchman or an Irishman does not lose his domicile of origin by accepting a commission in the English army. (*Yelverton's Case*, 29 L. J., P. & M. 34, followed.) *In re Mitchell, Ex parte Cunningham* . . . . . p. 137

ELEGIT.]—(1) Whether, in a case where possession of the goods of a debtor had been taken by the sheriff under a writ of *elegit* on December 22nd, 1883, but no delivery had been made to the judgment creditor prior to January 1st, 1884, when the Bankruptcy Act, 1883, came into operation (by which statute it is provided that writs of *elegit* shall no longer extend to goods), the judgment creditor was still entitled to delivery of the goods previously seized.

*Held*, that the judgment creditor was still entitled to delivery of the goods. *Hough v. Windas* . . . . . p. 1

(2) Whether, in a case where possession of the goods of a debtor had been taken by the sheriff under a writ of *elegit* on December 22nd, 1883, but no delivery had been made to the judgment creditor prior to the debtor being adjudicated a bankrupt under the Bankruptcy Act, 1883, which came into operation on January 1st, 1884 (by which it is provided that writs of *elegit* shall no longer extend to goods; and, further, that an execution against goods must be completed by seizure and sale in order to entitle the creditor to the benefit of the execution in case of the debtor's bankruptcy), the judgment creditor was still entitled to delivery of the goods seized.

*Held*: That the judgment creditor was not deprived of his right to the delivery of the goods. *In re Windas & Dunsmore, Ex parte Hough* . . . . . p. 22

(3) *Held*: That notwithstanding the provisions of section 146 of the Bankruptcy Act, 1883, a writ of *elegit* still extends to leaseholds. *Richardson v. Webb* . . . . . p. 40

EXAMINATION.]—See *Public Examination*.

EXECUTION.]—*Held*: That the meaning to be attached to the words "costs of the execution" in sub-section 1 of section 46 of the Bankruptcy Act, 1883, is different to the meaning to be attached to the same words in sub-section 2 of the same section. Under the words "costs of the execution" in sub-section 1, the sheriff is not entitled to poundage." *In re W. & J. Ludford* . . . . . p. 131

EXECUTRIX.]—See *Bankruptcy Notice* (6). *In re Woodall, Ex parte Woodall* . . . . . p. 201

FINAL JUDGMENT.]—(1) *Held*: That the words "final judgment" in section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, must be construed in their strict technical sense of a judgment in an action which established a liability previously existing of a debtor to a creditor. *In re Chinery, Ex parte Chinery* . . . . . p. 31

(2) *Held*: That the fact that an order has been made against a defendant requiring him to pay the taxed costs in an action within a specified time, does not constitute such order a "final judgment" within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to entitle the plaintiff, in the event of the defendant failing to comply with the terms of the order, to obtain a bankruptcy notice against the defendant founded on the order. *In re Cohen, Ex parte Schmitz* . . . . . p. 55

(3) *Held*: That a "balance order" made in the voluntary winding-up of a company, whereby a contributory was ordered to pay in to the liquidator certain calls made in respect of the said company before the commencement of the winding-up, is not a "final judgment" within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, so as to support a bankruptcy notice. *In re Sanders, Ex parte Whinney* . . . . . p. 185

(4) *Held*: That where a bankruptcy petition is presented by a creditor, founded on an act of bankruptcy committed by the failure of the debtor to comply with the terms of a bankruptcy notice to pay a judgment debt, it is a matter of discretion for the registrar whether he will make a receiving order or stay the proceedings; and the Court of Appeal will not interfere unless such exercise of discretion is clearly wrong. *In re Rhodes, Ex parte Heyworth* . . . . . p. 269

FIXTURES.]—(1) A lease of a mill and warehouse made October 1st, 1880, for twenty-one years contained the following covenants and provisoes:—

"That in case the said lessees shall during the said term be bankrupts, or file a petition in liquidation, or make an assignment for the benefit of their creditors, then the said term hereby created shall cease."

"That on the determination or cesser of the said term the machinery-room, warehouse and chimney shall be and remain the property of the company, but all the machinery, and also all the other buildings erected by the lessees, shall be their property, and shall be removed by them previously to the determination or cesser of the said term, unless it shall be then mutually agreed by the said company and the lessees that the company shall purchase them. The said lessees in case the same shall be removed to make good all damage which may be caused in their removal."

"That the several articles and things mentioned in the schedule hereto (*consisting of iron columns and beams in boiler-room, wood floor in oil mill, and other articles*), shall be the property of the lessees, and shall be removable by them; the said lessees making good all damage done by such removal."

In March, 1884, the lessees presented a bankruptcy petition under the Bankruptcy Act, 1883, upon which a receiving order was made.

*Held*: 1. That the lessees had taken such steps under the Bankruptcy Act, as, having regard to the provisions of the new Act and to section 149 of it, would justify the lessors in saying that the clause of forfeiture applied, and that consequently the presentation of the petition by the lessees caused a cesser of the term under that proviso.

2. That the official receiver was entitled to the articles mentioned in the clauses above, notwithstanding the forfeiture. *In re Walker, Ex parte Gould, Official Receiver* . . . . . p. 168

(2) *Held*: That where a trustee seeks to disclaim a lease under section 55, the Court may, if it thinks fit, under sub-section 3 of section 55, permit such trustee to remove fixtures. *In re Moser, Ex parte The Trustee* . . . p. 244

**FRAUDULENT PREFERENCE.]**—The debtor, who carried on business at two different premises, within a few days of filing his petition executed an assignment handing over his interest in the lease, goodwill and stock of one of the said premises to a judgment creditor who was threatening to levy execution, such assignment to be in full satisfaction of the whole judgment debt, and the judgment creditor was to redeem the lease of the property, which had been deposited on mortgage with a loan society, and to pay rent due, &c.

*Held*: That there was no proof that the motive of the debtor was to prefer the creditor; that at the time of the assignment the judgment creditor could seize and have his debt paid out of the goods at both the places of business of the debtor; that the effect of the assignment was to relieve the debtor of liability at one place of business and could not be deemed to be a fraudulent preference. *In re W. H. Wilkinson, Ex parte The Official Receiver* . . . p. 65

**FUNDS AND DIVIDENDS UNDISTRIBUTED.]**—See *In re James Pearce, Ex parte The Board of Trade* . . . p. 56

**GARNISHEE ORDER.]**—A garnishee order absolute is not a “final judgment” against the garnishee within the meaning of section 4, sub-section 1 (g), so as to make the failure to comply with a bankruptcy notice founded upon it an act of bankruptcy on the part of the garnishee. *In re Chinery, Ex parte Chinery* . . . p. 31

**INJUNCTION.]**—*Held*: That an injunction restraining a person, not a party to the bankruptcy proceedings, from dealing with property of the debtor claimed under a bill of sale, the validity of which is disputed, ought not to be granted without requiring an undertaking to be given for damages by the person obtaining the order. *In re F. H. Johnstone, Ex parte Abraham* . . . p. 32

**INSOLVENT ESTATE, Administration in Bankruptcy of.]**—*Held*: 1. That where an order has been made under sub-section 4 of section 125 of the Bankruptcy Act, 1883, transferring proceedings for the administration of a deceased debtor's estate from the Chancery Division of the High Court to the Court exercising jurisdiction in bankruptcy, the latter Court may make an administration order on an *ex parte* application by a creditor. 2. But such order cannot be made until the expiration of two months from the date of the grant of probate or of letters of administration, unless either the legal personal representative of the deceased debtor consents thereto, or unless such debtor has committed an act of bankruptcy within three months prior to his decease. *In re J. A. May, Ex parte E. May* . . . p. 232

**JUDGMENT.]**—See *Final Judgment*.

**JURISDICTION—Of Registrar.]**—On application to the registrar on behalf of the trustee in a bankruptcy under the Bankruptcy Act, 1869, that a solicitor should pay over to such trustee certain moneys alleged to be in his hands, and to belong to the bankrupt's estate, it was objected that under the terms of the Bankruptcy Act, 1883, the registrar had no jurisdiction to hear the application. *Held*: That the registrar had jurisdiction. *In re Evan Jones* . . . p. 17

**Of Bankruptcy Court.]**—(1) On an appeal from decision of registrar, refusing rehearing of a bankruptcy petition, with a view to the adjudication obtained under the Bankruptcy Act, 1869, being discharged, on the ground that at the time of the presentation of the bankruptcy petition the creditor's right to present it, and the liability of the debtor to be adjudicated a bankrupt under the Act of 1869, had ceased. *Held*:—That although the adjudication was made on wrong grounds, and was wrong in form, because it was an ordinary adjudication made upon the petition of a creditor under the Bankruptcy Act, 1869, founded on an act of bankruptcy committed by the previous filing of a liquidation petition by the debtor, and under such circumstances the proceedings ought to have been taken under the Bankruptcy Act, 1883, yet the Court would have had jurisdiction to make the adjudication under section 125, sub-section 12, of the Bankruptcy Act, 1869, in consequence of the failure of the liquidation proceedings; and the bankrupt not having raised the objection in the Court below, the adjudication must stand. *In re May, Ex parte May* . p. 50

(2) Where application made by a bankrupt, who had failed to pay over certain trust moneys in accordance with an order of the Chancery Division, for an order restraining further proceedings on a motion for attachment. *Held*: That the application must be refused. If the application had been made by the trustee in the bankruptcy for the benefit of the creditors, there might be some grounds for the Court to interfere. *In re Mackintosh v. Beauchamp, Ex parte Mackintosh* . . . . . p. 84

(3) The jurisdiction conferred on the Court of Bankruptcy by section 102 of the Bankruptcy Act, 1883, is the same as that formerly conferred on the Court by section 72 of the Bankruptcy Act, 1869. *In re Lowenthal, Ex parte Beesty* . . . . . p. 117

(4) *Held*: That where a bankruptcy petition is presented in the wrong Court by inadvertence, such Court has jurisdiction to hear the petition, and to make a receiving order. *In re Brightmore, Ex parte May* . . . . p. 253

**LANDLORD.]**—See *Disclaimer*.

- (1) *In re Zappert & Co., Ex parte The Trustee* . . . . . p. 72
- (2) *In re T. Brooke, Ex parte The Trustee* . . . . . p. 82
- (3) *In re Moser, Ex parte The Trustee* . . . . . p. 244
- (4) *In re Parker & Parker, Ex parte Turquand* . . . . . p. 275
- (5) *In re Page, Ex parte The Trustee* . . . . . p. 287

**LEASE.]**—See also *Disclaimer*.

*Held*: That notwithstanding the provisions of section 146 of the Bankruptcy Act, 1883, a writ of *elegit* still extends to leaseholds. *Richardson v. Webb* . . . . . p. 40

**Forfeiture of.]**—See *In re Walker, Ex parte Gould, Official Receiver* . p. 168

LIQUIDATION.]—(1) *Held*: That where proceedings in liquidation were pending on January 1st, 1884, which afterwards came to an end, proceedings to obtain an adjudication against a debtor founded on the act of bankruptcy committed by him by filing the liquidation petition might be taken under the Bankruptcy Act, 1883. *In re Pratt, Ex parte Pratt* . . . . . p. 27

(2) *Held*: That in determining whether it shall give sanction to a composition or liquidation by arrangement entered into under sections 125 and 126 of the Bankruptcy Act, 1869, in accordance with the provisions of section 170 of the Bankruptcy Act, 1883, the Court or registrar is not bound by the statement of affairs of the debtor put forward and agreed to by the creditors; but that such Court or registrar is entitled to inquire into the statement, for the purpose of seeing whether such composition or liquidation is reasonable and calculated to benefit the general body of creditors. *In re McAlpine, Ex parte McAlpine* . . . . . p. 126

MANAGER.]—See *Special Manager*.

MEETING OF CREDITORS.]—(1) *Held*: That the public examination cannot be concluded until the adjourned first meeting of creditors has been concluded. *In re William Williams* . . . . . p. 16

(2) See *In re Strand, Ex parte The Board of Trade* . . . . . p. 196

MORTGAGE.]—*Held*: That the provisions of Rules 78 to 81 of the Bankruptcy Rules, 1870 (*compare Nos. 65 to 69 of the Bankruptcy Rules, 1883*), were not intended to fetter the Court in cases where an application has been made to the Court by a mortgagee of property of the bankrupt for a sale of such property as provided by the rules, so as (1) to compel the Court to give the conduct of such sale to the trustee in the bankruptcy: or (2) to compel the Court to give the trustee a first charge on the proceeds of the sale for his costs and expenses in cases where the conduct of the sale has been taken away from him. *In re Jordan, Ex parte Lloyd's Banking Company* . . . . . p. 41

OFFICER.]—*Held*: That the onus of proof of domicile is, in the first instance, on the creditor presenting the petition.

That it is not sufficient, in order to throw the onus of proof on the other side, for the petitioning creditor to show that the debtor is an officer in the British army on active service out of England, and belongs to a regiment the headquarters of which are in England, and bears an English name.

A Scotchman or an Irishman does not lose his domicile of origin by accepting a commission in the English army. *In re Mitchell, Ex parte Cunningham* . p. 137

OFFICIAL RECEIVER.]—(1) *Held*: That the power of appointing a special manager given by section 12 of the Bankruptcy Act, 1883, to the official receiver is entirely a discretionary power; and the Court has no authority to interfere to compel an official receiver who refuses to make such appointment. *In re Frederick Whitaker* . . . . . p. 36

(2) *Held*: That an official receiver ought not to appear at the hearing of an appeal from a receiving order, unless it is necessary for him to do so for the purpose of bringing some special circumstance to the notice of the Court; and this special circumstance the Court will take into consideration when the costs are applied for. *In re Dixon & Wilson, Ex parte Dixon & Wilson* . . . p. 98

(3) *Held*: That where, before a composition is approved by the Court, the business of the debtor is carried on by the official receiver, who makes payments out of his own pocket and incurs personal liability for the purpose of carrying on such business, the proper order for the Court to make on approving the composition is, that the official receiver shall forthwith deliver up possession of the debtor's estate to the trustee under the composition, and that such trustee shall pay to the official receiver what may be found due to him out of the first assets which come into his hands. *In re Taylor, Ex parte The Board of Trade* . p. 264

(4) The Court does not sit to assist the official receiver or the trustee in simple matters relating to the management of the estate, but it sits for a judicial purpose; and where there is no question of law arising, there is no justification for coming to the Court.

The official receiver must be prepared to undertake the proper responsibility of his position, and he has no right in a simple case to come to the Court merely for information. *In re G. & A. Mahler, Ex parte Honygar*; *In re G. & Mahler, Ex parte Charbin* . . . . . p. 272

PARTNERS.]—Bankruptcy Act, 1883, section 4, sub-section 1 (g), and sections 5 and 7—Appeal to set aside receiving order—Irregularity of bankruptcy notice and petition—Bankruptcy petition in name of partners—Bankruptcy of one partner between service and hearing of petition—Amendment. *In re Owen, Ex parte Owen* . . . . . p. 93

PAYMENT.]—See *Suspending Payment*.

PETITION.]—(1) In a case where after a petition had been filed by a debtor in the County Court, the unsecured creditors of such debtor had been paid in full, and an application was in consequence made to withdraw the petition, which application the County Court judge refused to grant, on the ground that he was doubtful as to his power to do so—

*Held*: That there was clear jurisdiction to grant the application. *In re Wemyss, Ex parte Wemyss* . . . . . p. 157

(2) *Held*: That a bankruptcy petition presented by a creditor may be signed on behalf of such creditor by his duly constituted attorney. *In re Wallace, Ex parte Wallace* . . . . . p. 246

(3) *Held*: That where a bankruptcy petition is presented in the wrong Court by inadvertence, such Court has jurisdiction to hear the petition and to make a receiving order. *In re Brightmore, Ex parte May* . . . . . p. 253

(4) *Held*: That under the Bankruptcy Act, 1883, the old rule in bankruptcy still remains in force, that where a debt is vested in a mere trustee for an absolute beneficial owner who is capable of dealing with the debt as he pleases,

the trustee cannot alone present a bankruptcy petition against the debtor, but the beneficial owner must join in the petition. *In re Hastings, Ex parte Dearle* p. 281

(5) *Held*: That where by failing to comply with the terms of a bankruptcy notice a debtor has committed an act of bankruptcy under section 4, subsection 1 (g), of the Bankruptcy Act, 1883, any creditor may avail himself of such act of bankruptcy for the purpose of presenting a petition, and the right to present a petition is not limited to that creditor by whom the bankruptcy notice has been served. *In re Hastings, Ex parte Dearle* . . . . p. 281

POUNDAGE.]—See *Execution*.

PROOF.]—(1) *Held*: That where at the first meeting of the creditors of a bankrupt the chairman rejects the proof tendered by a creditor for the sum at which the bankrupt has entered and sworn to the debt in his statement of affairs, and the creditor appeals from such rejection, the bankrupt has no *locus standi* to appear and oppose the appeal, even though he may have been served with notice of the appeal; but it would seem that the bankrupt will be entitled to his costs of appearing. *In re G. C. Knight, Ex parte Smith & Co.* . . . . p. 74

(2) *Held*: That where the trustee rejects a proof tendered by a creditor, and from such rejection an appeal is brought, it is not sufficient to apply to the Court within the twenty-one days limited by Rule 174 of the Bankruptcy Rules, 1883, to fix a day and time for the hearing of the appeal, but notice of motion in the usual way must be served on the trustee within the twenty-one days. *In re Gillespie & Co., Ex parte Morrison & Aitcheson* . . . . p. 278

PUBLIC EXAMINATION.]—(1) *Held*: That the public examination cannot be concluded until the adjourned first meeting of creditors has been concluded. *In re William Williams* . . . . . p. 16

(2) *Held*: That a solicitor appearing for a creditor at the public examination of a bankrupt, for the purpose of examining the bankrupt as to his affairs, need not be authorized in writing. *In re C. G. Landrock* . . . . p. 21

(3) *Held*: 1. That the words "any proceeding in Court" in section 105, subsection 1, of the Bankruptcy Act, 1883, do not include a second meeting of the creditors under a bankruptcy petition, summoned for the purpose of confirming a scheme of arrangement of the debtor's affairs accepted at the first meeting.

2. That the Court has in consequence no power to order the costs of the petitioner incidental to such second meeting to be paid out of the debtor's estate.

3. But the words do include the public examination of the debtor, and the Court has power to order costs incidental to such public examination to be paid out of the estate. *In re Strand, Ex parte The Board of Trade* . . . . p. 196

REGISTRAR.]—See *Jurisdiction*.

REPUTED OWNERSHIP.]—*Held*: That where a picture was lent by the owner of it to the artist who had painted it for the purpose of being exhibited by him in a public gallery amongst other pictures painted by him and exhibited there

for sale, such picture did not pass to the trustee in bankruptcy on the artist becoming bankrupt, as being in his order and disposition within the meaning of section 44, sub-section (iii), of the Bankruptcy Act, 1883. *In re Cook, Ex parte Dudgeon* . . . . . p. 108

REVIEW OF TAXATION.]—*Held*: That an application by the Board of Trade for a review of taxation of the costs of a solicitor under Rule 104 of the Bankruptcy Rules, 1883, can only be made for the benefit of the estate, and where there is no estate and no trustee such rule will not apply. *In re Rodway, Ex parte Phillips* . . . . . p. 228

SALE—*Of Mortgaged Property.*]—*Held*: That the provisions of Rules 78 to 81 of the Bankruptcy Rules, 1870 (*compare Nos. 65 to 69 of the Bankruptcy Rules, 1883*), were not intended to fetter the Court in cases where an application has been made to the Court by a mortgagee of property of the bankrupt for a sale of such property, as provided by the rules, so as (1) to compel the Court to give the conduct of such sale to the trustee in the bankruptcy: or (2) to compel the Court to give the trustee a first charge on the proceeds of the sale for his costs and expenses in cases where the conduct of the sale has been taken away from him. *In re Jordan, Ex parte Lloyd's Banking Company* . . . . . p. 41

*Of Goods to Debtor.*]—*Held*: That where goods had been sold to a debtor, and there was no evidence to show that such goods were sold as to sample, the mere fact that a letter is subsequently written by the vendee to the vendor stating that he could not accept the goods, but would hold them for the vendor and try to sell them for him (and to which letter no answer is returned by the vendor) will not constitute the vendee a trustee for the vendor under section 44, sub-section 1, of the Bankruptcy Act, 1883, so as to prevent the trustee in the bankruptcy claiming such goods as part of the estate in the event of the vendee subsequently becoming a bankrupt. *In re Landrock, Ex parte Fabian* . . p. 62

SCHEME OF ARRANGEMENT.]—(1) It is the intention of the legislature that proposals for a composition or scheme of arrangement shall only be entertained after a receiving order has been made. *In re Dixon & Wilson, Ex parte Dixon & Wilson* . . . . . p. 98

(2) In a case where a scheme of arrangement of the debtors' affairs, duly agreed to and confirmed by the creditors in accordance with the provisions of section 18 of the Bankruptcy Act, 1883, contained a clause to the effect that "the debtors shall be discharged when the committee of inspection so resolve."

*Held*: That such provision dealing with the discharge of the debtors was unreasonable, and not in accordance with the intention and scope of the Act; and that a scheme containing such a provision ought not to be approved by the Court, even though the debtors themselves asked that such approval should be given. *In re Clarke, Ex parte Clarke* . . . . . p. 143

SECURED CREDITOR.]—*Held*: 1. That the estimate of the value of his security required of a secured creditor by section 6, sub-section 2, of the Bankruptcy Act, 1883, does not necessarily mean that such estimate shall be the



exact value, and the fact that a secured creditor has undervalued his security is not a ground for dismissing a bankruptcy petition presented by him.

2. A secured creditor so presenting a petition would be bound to give up the security to the trustee in the bankruptcy if he wishes to take it at the value placed by such secured creditor upon it in the petition. *In re Lacy, Ex parte Taylor* . . . . . p. 113

**SHERIFF.]**—See *Elegit*; *Execution*.

**SHORTHAND WRITER.]**—Costs of. *In re Day, Ex parte The Trustee* . p. 251

**SOLICITOR.]**—(1) *Held*: That a solicitor appearing for a creditor at the public examination of a bankrupt, for the purpose of examining the bankrupt as to his affairs, need not be authorized in writing. *In re C. G. Landrock* . . p. 21

(2) *Held*: That where, after the presentation of a bankruptcy petition, proceedings are carried on by a debtor, from which the official receiver comes to a clear conclusion that substantial advantage has accrued to the debtor's estate, such ought to be looked upon in the light of salvage, and the costs attendant upon the proceedings in question should be allowed out of the estate. *In re F. H. Johnstone, Ex parte Angier* . . . . . p. 213

(3) *Held*: That an application by the Board of Trade for a review of taxation of the costs of a solicitor under Rule 104 of the Bankruptcy Rules, 1883, can only be made for the benefit of the estate, and where there is no estate and no trustee such rule will not apply. *In re Rodway, Ex parte Phillips* . . p. 228

(4) *Held*: That where the solicitor of the petitioning creditor, as his agent, had received from the debtor between the date of the act of bankruptcy and the adjudication various sums of money in consideration of several adjournments of the hearing of the petition, such solicitor was personally liable to refund such money to the trustee in the bankruptcy, even though it had been paid over or accounted for by such solicitor to the petitioning creditor before the date of the order of adjudication. *In re Chapman, Ex parte Edwards* . . . . p. 238

**SPECIAL MANAGER.]**—*Held*: That the power of appointing a special manager given by section 12 of the Bankruptcy Act, 1883, to the official receiver is entirely a discretionary power; and the Court has no authority to interfere to compel an official receiver who refuses to make such appointment. *In re Frederick Whitaker* . . . . . p. 36

**STAY OF PROCEEDINGS.]**—See *Chancery Division*.

**SUSPENDING PAYMENT.]**—(1) *Held*: That a notice given by a debtor under section 4, sub-section 1 (h), of the Bankruptcy Act, 1883, that he has suspended, or that he is about to suspend, payment of his debts, need not, in order to constitute an act of bankruptcy, be necessarily given in writing. *In re Walker & Son, Ex parte Nickoll & Knight* . . . . . p. 188

(2) *Held*: 1. That where a verbal statement was made by a debtor to one of his creditors that he was unable to pay his debts in full, such statement did not amount to a notice by the debtor "that he has suspended, or that he is about to suspend, payment of his debts," so as to constitute an act of bankruptcy under section 4, sub-section 1 (h), of the Bankruptcy Act, 1883.

2. That although such notice need not, in order to constitute an act of bankruptcy, be necessarily given in writing, still if it is given verbally it must be a formal notice, and given with the intention of giving such notice. *In re Friedlander, Ex parte Oastler & Co.* . . . . . p. 207

TAXATION.]—See *Costs*.

TRANSFER OF PROCEEDINGS.]—(1) *Held*: 1. That when application is made under section 102, sub-section 4, of the Bankruptcy Act, 1883, for the transfer of an action pending in another Division of the High Court, some proof must be afforded that advantage is likely to be derived by reason of such transfer to the judge in bankruptcy. 2. That an assignment of the book debts will carry the books, so that the person entitled to the book debts under the deed is entitled to the books of account; and that Rule 259 of the Bankruptcy Rules, 1883, was intended to apply only to a case where a person not entitled to the debts sets up some claim to the books.

*Quære*.—Whether in a case where a receiving order has been made, but the debtor has not been adjudicated a bankrupt, the Court has any jurisdiction under section 102, sub-section 4, of the Bankruptcy Act, 1883, to make an order to transfer. *In re White & Co., Ex parte The Official Receiver* . . . p. 77

(2) *Held*: 1. That where the judge of a County Court refuses to grant a certificate under Rule 16 of the Bankruptcy Rules, 1883, that "in his opinion a bankruptcy proceeding would be more advantageously conducted in some other Court," such refusal is equivalent to an order to retain the proceedings, and from it an appeal will lie. 2. If the Court to which the appeal is made should be of opinion that such certificate ought to have been granted, it will not refer the matter back to the County Court, but will grant the certificate itself. *In re Walker, Ex parte Soanes* . . . . . p. 193

(3) *Held*: That where an order has been made under sub-section (4) of section 125 of the Bankruptcy Act, 1883, transferring proceedings for the administration of a deceased debtor's estate from the Chancery Division of the High Court to the Court exercising jurisdiction in bankruptcy, the latter Court may make an administration order on an *ex parte* application by a creditor. But such order cannot be made until the expiration of two months from the date of the grant of probate or of letters of administration, unless either the legal personal representative of the deceased debtor consents thereto, or unless such debtor has committed an act of bankruptcy within three months prior to his decease. *In re J. A. May, Ex parte E. May* . . . . . p. 232

TRUSTEE.]—*Held*: That the fact that a trustee has been proposed by the brother of the bankrupt; and that such trustee has previously voted in favour of a composition and scheme of arrangement of the debtor's affairs; and that

no committee of inspection is appointed, will not justify the Board of Trade in objecting to the appointment of such trustee under section 21, sub-section (2), of the Bankruptcy Act, 1883, even though the majority in number of the creditors are desirous that such objection should be made. *In re George Games, Ex parte The Board of Trade* . . . . . p. 216

See also *Disclaimer; Sale; Official Receiver; Proof; Petition.*

UNDISTRIBUTED FUNDS AND DIVIDENDS.]—See *Committal; Dividends.*

WRIT OF ELEGIT.]—See *Elegit.*

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